LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 7 1968
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

October Term, 1967

No. [redacted] 44

WILLIAM SKINNER, AUGUST R. GUELDNER AND ALTON J. CHABBONNET,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

Petition for Writ of Certiorari to Review Decision of the Supreme Court of Louisiana in State of Louisiana vs. William Skinner, et al., No. 48,445 of the Docket of said Court.

G. W. GILL, SR.,
GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,
Phone: 524-0147,
ROBERT S. LINK, JR.,
National Bank of Commerce Bldg.,
New Orleans, La.,
Attorneys for Petitioners.

## TABLE OF CONTENTS.


| | Page |
|---|---|
| Opinion Below | 2 |
| Jurisdictional Statement | 2 |
| Questions Presented | 3 |
| Statutes Involved | 3 |
| Statement | 4 |
| Reasons For Granting The Writ | 16 |
| Conclusion | 24 |
| Certificate of Service | 25 |
| Appendix A—Opinion Below | 27 |
| Appendix B—Article 292 Louisiana Code of Criminal Procedure | 65 |


## TABLE OF AUTHORITIES.


Citation:

Pointer v. Texas, 380 U.S. 400, 3 L.Ed.2d 923, 85 S.Ct. 1065 ..... 16

Statutes:

The Fourteenth Amendment, United States Constitution ..... 14

Article 292, Louisiana Code of Criminal Procedure ..... 65

**SUPREME COURT OF THE UNITED STATES**
**October Term, 1967.**

---

**No. .....**

---

**WILLIAM SKINNER, AUGUST R. GUELDNER AND ALTON J. CHARBONNET,**
**Petitioners,**

**versus**

**STATE OF LOUISIANA,**
**Respondent.**

---

**Petition for Writ of Certiorari to Review Decision of the Supreme Court of Louisiana in State of Louisiana vs. William Skinner, et al., No. 48,445 of the Docket of said Court.**

---

*TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:*

Petitioners, William Skinner, August R. Gueldner and Alton J. Charbonnet, pray that a writ of certiorari issue to the Supreme Court of Louisiana to review the judgment of that Court rendered on Monday Nov. 7, 1967 and rehearing denied on December 11, 1967. Said judgment sought to be reviewed is the judgment on rehearing wherein the Court recalled its earlier judgment of reversal and affirmed the conviction and sentences of petitioners in a narcotics prosecution, said sentences ranging from ten to fifty years. The proceedings below are entitled:

"State of Louisiana vs. William Skinner, August R. Gueldner and Alton J. Charbonnet, No. 48,455" of the Docket of the Supreme Court of Louisiana.

## CITATIONS TO THE OPINION BELOW.

The Opinion below is reported in 204 So. 2d 370.

## JURISDICTIONAL STATEMENT.

Petitioners were jointly tried and convicted in a prosecution involving alleged sale and possession of marijuana in the Criminal District Court for the Parish of Orleans, State of Louisiana and said conviction and sentence was, after an initial reversal, affirmed on rehearing by a divided State Supreme Court. Said final judgment, i.e., the affirmance on rehearing, was rendered by the State Supreme Court on Nov. 6, 1967 and an application for second rehearing was denied on December 11, 1967. Sentences imposed range from 10 to fifty years, your petitioner Alton J. Charbonnet, a 33 year old negro, receiving the latter sentence as a second offender. (Vol. 1, R. 19.)

The statutory provision relied upon as conferring jurisdiction upon this Court for the issuance of certiorari is Title 28, United States Code, Sec. 1257(3). The Supreme Court of Louisiana is the highest Court of the State and the judgment herein complained of is a final judgment.

## QUESTIONS PRESENTED.

1. Were the constitutional rights of petitioners to due process and equal protection of the laws denied by reason of the fact that one of your petitioners, Alton J. Charbonnet, was neither present nor represented by counsel during the hearing of certain preliminary motions involving the taking of extensive evidence affecting the entire case?

2. Were petitioners denied due process and equal protection of the law by reason of the fact that, although the information contained no charge of conspiracy, the trial judge, over objection, gave a charge on the entire law of conspiracy?

3. Were petitioners denied due process of law by reason of the fact that counsel for Skinner and Gueldner, Mr. Gill, was ill and exhausted, the trial Judge nevertheless held an all night session climaxing at nearly 3 a.m., reconvened at 9:30 to finish the case, and two of the jurors were asleep during part of the trial?

## STATUTES INVOLVED.

1. The due process clause and the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT.

Your petitioner Alton J. Charbonnet, a 33 year old negro, was charged jointly with petitioners Skinner

and Gueldner in an information charging two counts relative to marijuana: sale and possession. At the time of trial there was also pending against all three petitioners a charge of conspiracy relative to the same narcotics transaction *but said case was not tried or in any way consolidated with the instant case.* Nevertheless, as noted below, the trial judge evidently confused the instant case with the conspiracy case. This is indicated by the fact, as noted hereafter, that he referred to the instant case, during trial of a preliminary motion, as one involving *conspiracy* (Vol. 1, R. 64) and *he finally* gave a full blown charge on conspiracy, though none was charged.

Such confusion during the trial, and during handling of preliminary motions, is further indicated by the failure to have defendant (petitioner) Charbonnet even present in Court during the trial of certain motions vitally affecting his case.

Your petitioner William Skinner was a fairly prosperous dealer in second hand automobiles with two outlets for retail sales in New Orleans. Gueldner was his employee who assisted in sales and was generally active in the business. State undercover narcotic agents were first seeking to make a case against another employee, not here involved and, for that purpose, they infiltrated Skinner's automobile business by virtue of automobile loans which one agent controlled through a "front" as manager of a financing agency. (Vol. 2, R. 680.) Using his leverage as mana-

ger of the finance company, vital to Skinner's business, this agent in disguise first began to probe his influence on Skinner by first getting the latter to loan or give him money for betting at the race track. (Vol. 2, R. 456.) Later, the same agent, probing still further the extent of his influence upon Skinner, persuaded the latter to obtain dates with women for him. Finally, having found Skinner willing and eager to please, the State contends that the agent got Skinner to put him into contact with Charbonnet for the purpose of obtaining some marijuana. (Vol. 2, R. 420.)

The information charged a single transaction on May 21, 1965. (Information, Vol. 1, R. 22.) Both the count for possession and the count for sale involved the same $20.00 worth of marijuana in a matchbox. (Vol. 2, R. 422.) For the purpose of showing system or intent, however, the State was permitted to offer proof of an entirely separate transaction *a week later,* involving another sale of marijuana on May 28, 1965, plus another sale, later the same date, involving heroin, *and in which defendant Charbonnet alone was allegedly directly involved.* The foregoing issues are not briefed herein, except collaterally, and insofar as they involve the error of giving the conspiracy charge where no conspiracy was charged in the information. The above information is furnished here merely as background to illustrate the overall nature of the case.

## ABSENCE OF CHARBONNET AND LACK OF REPRESENTATION BY COUNSEL.

Bill of Exceptions No. 35 (Vol. 2, R. 388) relates to the denial of a motion for new trial because defendant Charbonnet, although a co-defendant, was neither present nor represented by counsel during the hearing of certain important preliminary motions vitally affecting his case.

The minute entries in this case reflect that on August 26, 1965 all three defendants were arraigned together and all pleaded not guilty. (Vol. 1, R. 1.) (The date "Aug. 26, 1966" here is an obvious clerical error.) The same entry notes that defendants Skinner and Gueldner were given ten days in which to file technical pleadings and defendant Charbonnet was given the *same delay to determine counsel. Thus, he was not even represented by counsel at his initial arraignment.*

Charbonnet, an indigent negro, was at first unable to obtain counsel and an additional delay was granted. On Sept. 20, 1965 the Court appointed Mr. Monie as counsel for Charbonnet. (Vol. 1, R. 2.)

On Sept. 21, 1965, Mr. Gill, as counsel for Skinner and Gueldner filed a motion for bill of particulars, motion for preliminary examination, a motion to quash and a motion to quash the search warrant. (Vol. 1, R. 2.)

The case did not go to trial until the following year, on March 21, 1966. Meanwhile defendant Charbonnet was supposedly represented by a succession of Court appointed counsel, one of whom died. (Vol. 1, R. 4.) During this lengthy period in which Charbonnet was nominally represented by Court appointed counsel:

(a) He was never present at the trial of the many motions noted above, vitally affecting his case;

(b) The minutes fail to reflect that he was ever represented by counsel at the trial of these important motions; and

(c) He was never even notified of the trial of these motions, his counsel were never so notified and Charbonnet himself languished in jail during this period, being unable to make bail.

The motions for a bill of particulars, plea of entrapment and motion to quash were heard, evidence taken and disposed of on September 28, 1965. (Vol. 1, R. 3.)

On Oct. 8, 1965 the minutes reflect that the motion for preliminary hearing was disposed of (Vol. 1, R. 4) and it was in this connection that the Court, in holding that a prima facie case had been made out so as to *hold the three defendants for trial,* held that a case for conspiracy had been made, *despite the fact that conspiracy was not charged in the instant case.*

Reference to a conspiracy, therefore, could only have related to a separate pending case. Significantly however, on this, as on the hearing of other motions noted above, the Court was making rulings which had a direct and vital bearing upon defendant Charbonnet, who was neither present nor represented during the extensive trial of such motions and who was not even notified that they were being held.

It was not until Jan. 18, 1966 that defendant was able to obtain employed counsel, Mr. Link. (Vol. 1, R. 5.) Said counsel immediately proceeded to request copies of the transcript of the proceedings in the many motions noted above and this request was granted. (Vol. 1, R. 5.)

As noted below, both the trial Court and the Supreme Court were later to justify this complete ignoring of defendant Charbonnet during the trial of the many preliminary matters on the theory that:

(a) The motions were filed by counsel for the other two defendants and not on behalf of Charbonnet; and (b) That furnishing counsel with a copy of the transcript of these proceedings cured all evils.

The extensive testimony taken in connection with the above motions, including the preliminary examination and motion to suppress covered some 47 pages of testimony. (The transcript of this testimony, through clerical oversight, appears in reverse order. The testimony in connection with the Oct. 8 hearing

commences at page 41 of Vol. 1 and that in connection with the Sept. 28 hearing commences at page 73 of the same volume.)

During the trial of two of these jointly heard motions, in which extensive testimony was heard, the trial Judge expressly noted the absence of defendant Charbonnet: (Vol. 1, R. 80)

BY THE COURT: "*** In the second count they are charged with—*three people are charged here*—Mr. Charbonnet, BUT HE'S NOT HERE BECAUSE HE NEVER ASKED FOR THIS HEARING—did wilfully *** etc." (Emphasis added.)

The failure of the Court to have defendant Charbonnet present at hearing of these vital motions, particularly during the preliminary hearing, was doubly prejudicial: First, it prejudiced the rights of defendants Skinner and Gueldner by depriving them of the benefit of having Charbonnet being present to hear what was being said by the State witnesses, particularly during the preliminary examination. Secondly, it prevented Charbonnet being on hand so as to hear what was being said against him at a time when he or his counsel could do something about it, i.e., exploit any "breaks" in the case.

This highly unusual procedure of attempting to try "piece meal" *a case tightly involving three defendants, leaving one out altogether,* was in direct violation of State constitutional safeguards, discussed be-

low, and violative of the rights of all defendants to due process under the due process clause of the 14th Amendment to the Constitution of the United States.

## THE GIVING OF A CONSPIRACY CHARGE.

In its original opinion the State Supreme Court reversed the conviction and sentence on the sole basis that a charge of conspiracy had been given by the trial Judge, despite the fact that there was no charge of conspiracy whatever contained in the information. This error was covered in Bill of Exceptions No. 29 which appears at Vol. 2, R. 252 and the Per Curiam to this Bill Appears at Vol. 2, R. 356 et seq.

As will appear by the Court's Per Curiam, the trial Judge told the jury: (Vol. 2, R. 356)

"CONSPIRACY

"I charge you, gentlemen of the jury that a criminal conspiracy is defined to be a combination or agreement between two or more persons to do a criminal or unlawful act, or to do a lawful act by criminal or unlawful means. It has been said that a criminal conspiracy is a partnership in criminal purposes."

At Vol. 2, R. 358, the Judge continued on this extensive conspiracy charge as follows:

"When a conspiracy is entered into to do an unlawful act, all persons engaged therein are responsible

for all that is done in pursuance thereof by any of their conspirators, until the object for which the conspiracy was entered into is fully accomplished.

"This responsibility is not confined to the accomplishment of the common design for which the conspiracy was entered into, but it extends to, and includes, collateral acts and incidental and growing out of the common design."

Specific objection was made to the giving of this sweeping charge of conspiracy in a case in which conspiracy was not charged at all. (Vol. 2, R. 252.)

The highly prejudicial effect of granting this conspiracy charge is developed below.

**LONG HOURS, SLEEPING JURORS AND ILL AND EXHAUSTED COUNSEL.**

Mr. Gill, counsel for defendants Skinner and Gueldner, was suffering from a severe case of diabetes and other ailments later described by his personal physician as making it physically impossible for him to work all night in trial. (Vol. 2, R. 338.)

Trial of the case had commenced at 10:30 a.m. and continued on, with the usual recesses until the State rested near midnight. Thereupon the following occurred: (Vol. 3, R. 604)

BY MR. DOLAN: The State at this time will rest its case, reserving the right to rebuttal.

BY MR. GILL: *Before asking for a recess.* I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If Your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.

BY THE COURT: YOU HAVE BEEN AFTER ME ALL DAY, MR. GILL. I've gotten tired of listening to you. I am going to see if we can't finish this case tonight. Go to work and see if we can't finish this case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'M SURE EVERYONE IS TIRED, ETC.

Thereupon, after a brief exchange Mr. Gill informed the Court that he was suffering from a "severe case of diabetes" (R. 605) which was later amply borne out by medical testimony of his personal physician, Dr. Morrison, on hearing of the motion for new trial.

Thereupon the Court replied "I know you have been ill" and added that "we have been having continuances on top of continuances" but generously allowed this 65 year old, weary diabetic a *THREE MINUTE RECESS.* (R.605.)

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please I respectfully request Your Honor declare a mistrial.

BY THE COURT: Request for mistrial is denied.

BY MR. GILL: Respectfully object and reserve a bill of exceptions.

BY THE COURT: You may have your bill.

BY MR. GILL: Respectfully request a recess.

BY THE COURT: The Court will be at recess for *three minutes.*

After denying the request for a recess the first night *and the motion for a mistrial made upon such denial* (R. 605) the Court then kept the Court going till about *THREE O'CLOCK THE NEXT MORNING.* (R. 687.)

The jury was then ordered back for 9:30 a.m. that same morning at which time they heard arguments, received instructions and retired at 2:45 p.m.

On a motion for new trial, the excessively long hours were complained of and it was alleged that as a result: (a) Some of the jurors were asleep and (b) Due to his diabetic condition Mr. Gill was physically

and mentally unable to perform in such round the clock fashion and still do justice to his clients.

Extensive evidence was heard on this motion (R. 255) including the testimony of the jurors, bystanders who saw two of them either sleeping or apparently asleep during trial and Mr. Gill's personal physican, Dr. Morrison who gave a detailed history of Mr. Gill's medical history during recent years, showing conclusively that, due to his diabetic condition and other ailments, it was physically impossible for him to perform as a trial counsel until 3 a.m. with any degree of mental alertness whatever. He also described the resultant effects of this ordeal upon his patient after the trial, and how he was hospitalized and treated for weeks thereafter.

Mr. Gill also took the stand, testified to his physical condition when he first moved for a mistrial, and testified also to the fact that, the following day, during his own argument to the jury, he noticed one of the jurors nodding and apparently asleep. (R. 322 and 323.) He admitted that he probably should have moved for a mistrial then or called the Court's attention to the sleeping juror but he was in such poor physical condition that his judgment was not good and he did nothing. (R. 323.)

During the hearing of this motion the trial Judge argued with Mr. Gill as to whether or not any juror had been roused from sleep by a court attache, the Judge insisting that no such thing happened. (R. 323,

324.) However, after several witnesses testified that at least two of the negro jurors were either asleep or apparently sleeping, THE TRIAL JUDGE'S OWN CRIER, MR. MARCHESE, TESTIFIED THAT HE HAD DEFINITELY NOTED ONE NEGRO JUROR HAD HIS EYES CLOSED. (R. 349, 350.)

Mr. Gill's personal physician, Dr. Morrison, gave a detailed medical history of his patient and made perfectly clear that the ordeal of being made to try a case all day, straight through until 3 a.m. and then being made to return at 9:30 a.m. the same morning to continue trying a case made it impossible for Mr. Gill to maintain any degree of efficiency whatever in his condition. Dr. Morrison stated that, after working beyond a twelve hour period his efficiency would be "almost nil". (Vol. 2, R. 338.) Dr. Morrison was intimately acquainted with Mr. Gill's physical history, having treated him for many years. He stated that his patient had been suffering from diabetes since 1951 or 1952. (Vol. 2, R. 339.) At the time of trial he had been suffering from an acidotic condition due to diabetes together with nervous exhaustion which had commenced about March 15, 1966 (six days before trial) and that when he examined Mr. Gill shortly after trial on March 26 he was complaining of feeling very fatigued and having pain over the region of the heart. He seemed to have a bloated appearance and had a blood sugar content which was abnormally high —about 240 as against a normal range of between 80 to 130. (Vol. 2, R. 338, 9.) Due to a shortage of beds in the hospital he couldn't hospitalize him imme-

diately, despite efforts to do so at both Baptist Hospital and Touro. He treated Mr. Gill until March 31, when he finally got him into a hospital and he stayed in the hospital until April 12, stating: "It took that amount of time to get his diabetes under control", and he continued home treatment for the diabetes and other ailments discovered during the hospitalization period. (R. 339, 340.)

## REASONS FOR GRANTING THE WRIT.

Here we have an indigent negro, Charbonnet, jointly charged in a single, two count information, with sale and possession of marijuana, who was not represented at all by counsel, either at his initial arraignment or through the trial of many crucial motions vitally affecting his defense. Moreover, he was not even present during the trial of these important motions. The excuse given, noted above by the language of the trial Court is that he was not required to be present simply because he had not filed the motions.

*Pointer v. Texas,* 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965) settled the issue that the right to counsel and right to be present at trial, guaranteed by the Sixth Amendment to the Constitution of the United States are binding upon State criminal prosecutions and the denial of such rights is a denial of due process under the Fourteenth Amendment.

The motions mentioned above, particularly the motion for a preliminary hearing and the hearing which

was held pursuant to such motion, encompassed issues vital to Charbonnet. These defendants were jointly charged in a single information involving a single transaction, i.e., the sale and possession of $20 worth of marijuana. As noted above, the trial Judge himself admitted, in disposing of the preliminary hearing, that he found joint action by the three accused, (Vol. 1, R. 64). In fact, in the confusion which prevailed, he found an outright conspiracy, though no conspiracy was formally charged.

The issue involved in the preliminary hearing was whether or not *any or all three* of the jointly charged defendants, could be held for trial. The Court held that there was such sufficiency as to all three. This, clearly, was a finding which vitally affected Charbonnet. *Yet he was neither present nor represented nor even notified of this hearing or the others described above.*

Moreover, it is untenable to suppose that failure of his later employed counsel to move anew for another preliminary hearing or to renew the other motions, amounted to a waiver of any kind. UNDER LOUISIANA LAW THE GRANTING OF A PRELIMINARY HEARING IS DISCRETIONARY AND THERE IS LITTLE LIKELIHOOD THAT THE TRIAL JUDGE, HAVING HEARD THIS EXTENSIVELY TRIED MOTION, WOULD HAVE GRANTED A RE-TRIAL OF THE SAME MOTION. (See Appendix B, pertinent La. Criminal Code Articles.)

In addition to the lack of counsel, of course, the weird procedure here was a violation of the basic rights to confront ones accusers, guaranted even under the State Constitution. We submit that the rationale of the Supreme Court of Louisiana on this point, Appendix A, pages 55 et seq., is wholly incomprehensible. The statement by the Supreme Court of Louisiana: (at page 56 of the opinion, Appendix A)

"*** he was never without counsel."—is true only in the sense that Charbonnet had a succession of appointed counsel but neither he nor they were ever notified of the various motions or hearings and Charbonnet was neither present or represented until long after his arraignment and long after the many motions vitally affecting him had been disposed of. Such piece meal procedure in which an indigent negro is left in jail, unnotified and unrepresented to all practical purposes, while the other jointly charged defendants fight out vital issues in Court, is simply barbarous in this supposedly enlightened age. What the Supreme Court of Louisiana sanctioned here was not even good procedure before the Civil War. It harks back to the Star Chamber.

Moreover, by reason of the absence of Charbonnet from these hearings, particularly the preliminary hearing and motion to quash, the other defendants, Skinner and Gueldner, were deprived of whatever benefit they might have derived by reason of his being able to hear the details of what was charged. Having him present physically in Court would have been of

substantial assistance to these last named accused because Charbonnet alone was present during the heroin transaction (engrafted onto the marijuana charge) and he alone was in a position to furnish information whereby the State witness could have been challenged on this phase.

**THE CONSPIRACY CHARGE.**

In its original opinion the State Supreme Court reversed the conviction solely on the basis of the giving of the charge on conspiracy when no conspiracy was charged.

Let us examine the practical prejudicial effect here of the charge on conspiracy. As noted above, the information here simply charged the three defendants, in two counts, with selling marijuana and with possessing marijuana, both on the same date, May 21, 1965. (R. 22, 23, information) As noted in later bills of exception, the State, under the justification of showing "system" or intent, was permitted to introduce evidence of two other offenses at a later date, May 28, 1965. These last two offenses involved marijuana and heroin. The second sale of marijuana took place allegedly at the same place as the first but the heroin sale allegedly took place at an entirely different location, near a housing development. Moreover, there is not the slightest connection between the heroin sale and either Skinner or Gueldner except the contention that, one week earlier, Skinner had introduced undercover agent Fullington

to Charbonnet. As to the heroin transaction there is not the slightest contention in any of the testimony that either Skinner or Gueldner knew anything about a proposed attempt by either agent to buy heroin. In fact, even taken at face value, the State's evidence shows that even the alleged vendor of the heroin, Charbonnet, did not know that any sale of heroin was in prospect. The agent himself says *that he brought up the subject after completing the second marijuana purchase.* (R. 577, 578.)

Thus, in view of this sharp conflict of the evidence as to the May 21, 1965 transaction (the only offenses charged in both counts of the information) the jury, properly charged, might well have acquitted all three defendants. The later evidence as to the marijuana and heroin sales on May 28 could only have been considered under the theory of system or intent. But, under the sweeping charge given as to the crime of conspiracy, it was impossible for the jury to understand that they could convict only for participation, in some way, with the offenses of possession and sale on May 21, the only offenses actually charged. This seems clear, particularly when the language previously quoted is considered in the light of its practical meaning to laymen. We will not quote the entire charge here but simply emphasize the following instruction by the Court, just after his original sweeping definition of conspiracy. Thus he stated. (R. 358.)

"This *responsibility is not confined to the accomplishment of the common design* for which the con-

spiracy was entered into, *but it extends to, and includes collateral* acts and incidental and *growing out of the common design, etc.*" (Emphasis added.)

How else can this be taken by a juror except as an invitation to convict on the basis of the May 28 transactions regardless of how they felt about the offenses actually charged?

In its opinion on rehearing herein (Appendix A, p. 58 et seq.) the State Supreme Court seeks to justify the reversal of its position on the original hearing wherein the conspiracy charge had been held improper. This discussion, however, ignores completely the prejudicial effect of:

(a) Permitting the giving of a full blown charge of conspiracy complete with the "partnership of crime" instruction wherein the *acts* of all conspirators are chargeable against each other; and

(b) Combining such an instruction with the "system or intent" rule of evidence whereby other offenses, not charged at all, are brought before the jury.

Such a combination, we submit, makes it impossible for a jury to understand that the accused are being tried only for the offense charged, the substantive offense. The element of the conspiracy charge, in which the jury is told that the *acts* of one are chargeable to the other, is an invitation to find any

defendant guilty of any criminal act, whether charged in the information or not. Such a combining of the theory of conspiracy (where no conspiracy is charged) with the "system or intent" rule as to admissibility of other offenses, creates a hodge-podge of confusion which destroys the basic principle of due process that a man can be convicted only of the offense with which he stands charged.

## ILLNESS AND EXHAUSTION OF COUNSEL AND THE SLEEPING JURORS.

In disposing of the problems posed by the all-night session and the illness and exhaustion of counsel, the Supreme Court, on rehearing (Appendix A, p. 43 et seq.) notes:

"The record definitely reflects that Mr. Gill was a sick man, but it also reflects that when he questioned defendants' witnesses he was astute, thorough and vigorous."

Just how the Supreme Court, reading a cold record, could reach any conclusions as to how "thorough" counsel was when obliged to do battle through the middle of the night, is of course a mystery. Most Courts content themselves with endeavoring to ascertain what *is* in the record. The Louisiana Supreme Court, however, in reaching the above conclusion has, concluded that counsel had done a thorough job and gotten everything into the record that he wanted to. The dangers of such clairvoyant conclusions, how-

ever, is indicated by the fact that, on motion for rehearing it was pointed out that, due to his illness and exhaustion *Mr. Gill had failed to call a key witness for the defense, a party who was to testify as to the true ownership of the automobile in which the marijuana was allegedly found.*

Moreover, as developed in the motion for rehearing, the morning after the all night session, or more properly, six hours after the "recess" at 3 a.m., after a minimum of sleep, counsel were then required to argue their case to a very sleepy jury at 9:30 a.m. There is internal evidence, in the argument of Mr. Gill, that he was indeed, "mortally tired". A veteran of many years criminal law practice, *we find this weary warrior trying to testify ln closing argument,* to which the State properly objected. (Vol. 2, R. 247.)

As to the sleeping jurors, the State Supreme Court blithely brushes this aside by stating that they "were cognizant of the proceedings". (Appendix, p. 45). There was, however, overwhelming evidence that two jurors were asleep and the Court's own crier had the courage to testify to such fact. Under the Courts' approach, all that is required in the jury box is twelve "warm bodies". If this is so, (in Louisiana) we submit it is not due process under Federal concepts.

## CONCLUSION.

Many other errors were committed in this travesty of a trial in which the indigent negro, unrepresented except at the actual trial, was sentenced to fifty years in the penitentiary. We submit that any one of the three errors noted above is of sufficient national interest to warrant relief by certiorari here.

For the foregoing reasons petitioners pray that a writ of certiorari be issued to the Supreme Court of Louisiana in the above cause.

G. W. GILL, SR.,

GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,
Phone: 524-0147,

ROBERT L. LINK, JR.,
National Bank of Commerce
Bldg.,
New Orleans, La.,
Attorneys for Petitioners.

## CERTIFICATE OF SERVICE.

I. G. Wray Gill, of counsel for petitioners and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing petition for certiorari has been served upon opposing counsel, the Attorney General of Louisiana and the District Attorney for the Parish of Orleans, by mailing same, postage prepaid and properly addressed to their respective offices on March ..., 1968.

March ..., 1968.

G. WRAY GILL

INTENTIONALLY LEFT BLANK

## APPENDIX A—OPINION BELOW

### (ON REHEARING)

HAMLIN, Justice:

On original hearing, we set aside the convictions and sentences of the defendants and remanded this case for a new trial. We disposed of only Bill of Exceptions No. 29, finding that it was with merit and that the error complained of therein was prejudicial to the defendants. On application of the State, an unlimited rehearing was granted. Herein, we shall consider all bills of exceptions reserved during the course of trial and not abandoned in this Court.

Defendants were jointly charged by bill of information containing two counts, with a violation of LSA-R.S. 40:962 on May 21, 1965. The first count charged them with wilfully and unlawfully selling marijuana to Ben Fullington; the second count charged them with the wilful and unlawful possession of marijuana, a narcotic drug. They were tried and all found guilty as charged on both counts and sentenced to serve lengthy terms in the State Penitentiary.[1] They ap-

[1] Skinner was sentenced to serve ten years at hard labor in the State Penitentiary under the first count and five years at hard labor in the State Penitentiary under the second count, the sentences to run concurrently. Under the provisions of LSA-R.S. 15:529.1 (Sentences for second and subsequent offenses) Charbonnet was sentenced to serve fifty years at hard labor in the State Penitentiary under the first count and twenty years under the second count, the sentences to run concurrently. Also under LSA-R.S. 15:529.1, Gueldner was sentenced to serve sixteen years and eight months at hard labor in the State Penitentiary under the first count and five years under the second count, the sentences to run concurrently.

pealed to this Court and the proceedings supra transpired.

**BILLS OF EXCEPTIONS Nos. 6, 18, 19 and 21**

The above bills are related and will be jointly discussed and determined.

Bill of Exceptions No. 6 was reserved when the trial judge overruled defense counsel's objection to certain parts of the district attorney's opening statement and also denied counsel's motion for a mistrial.

The district attorney's opening statement, which sets forth the alleged pertinent facts of this case, recites in the main:

> "* * * As set out in the bill of information, the defendant, Alton Charbonnet, August Gueldner, and William Skinner, are charged with the violation of Revised Statute 40:962, relative to the sale and possession of marijuana. Said offense occurred on May 21, 1965. * * * The facts will show that on May 21, 1965, Special Agent Benjamin Fullington of the Louisiana State Police Department, in his role as undercover agent, went to Skinner's Motor Mart at 2101 Canal in the City of New Orleans and met with the defendants, August Gueldner and William Skinner for a tentative narcotics buy. At the time Skinner stated to the agent he knew someone who could get the stuff. In Agent Fullington's presence, the defendant Skinner, made a phone call and after completing

the call, told the agent he would have a matchbox of marijuana delivered that night at 2101 Canal. At about 8:00 P.M. that evening Agent Fullington returned to the auto lot and asked Skinner and Gueldner if the stuff had been delivered. Skinner confirmed the delivery and stated the man who sold it wanted to meet him. Skinner then introduced Agent Fullington to Alton Charbonnet. Charbonnet told Agent Fullington that the stuff was stashed under the seat of a 1960 white Lincoln convertible which was parked in this lot. Upon reaching the 1960 Lincoln convertible which belonged to Skinner, Fullington reached under the seat on the driver's side and removed a matchbox which contained a brownish green vegetable matter later identified as marijuana. * * * During the course of the trial the State will introduce evidence of a subsequent sales transaction involving the three defendants to Detective Russell Hebert, an undercover agent, in order to show system, intent, and guilty knowledge, which occurred on May 28, 1965. * * * these defendants were arrested at a later date when the undercover operation was concluded. At the time of the arrest of the defendant, William Skinner, he made certain oral statements, admissions, and/or confessions, which the State will attempt to introduce after laying the proper legal foundation. * * * The State will offer and introduce and file into evidence the following physical evidence which was sold to Agent Benjamin Fullington on May 21, 1965: One matchbox containing greenish brown vegetable matter,

chemically analyzed as marijuana; one large evidence envelope and one small evidence envelope. The State will further offer, introduce and file into evidence the following physical evidence which was sold to Detective Russell Hebert on May 28, 1965: Nine handrolled cigarettes, chemically and microscopically classified as marijuana; one small evidence envelope, one large evidence envelope, and four capsules of white powder identified as heroin, an opium derivative, along with a small manila envelope and a large manila evidence envelope. * * *"

Bills of Exceptions Nos. 18, 19 and 21 were reserved when the trial judge overruled defense counsel's objections to the testimony of the State's witnesses with respect to the alleged sales of May 28, 1965 and the negotiations therefor (supra, opening statement), overruled counsel's objections to the introduction in evidence of the narcotics allegedly sold on May 28, 1965 (supra, opening statement), and denied defendants' motion for a mistrial.

Counsel for the defendants contended that the State should have elected to try the alleged case of May 28, 1965. They argued that there could be no system for the sale of narcotics—not being similar to embezzlement or an offense that presupposes a system. They argued that the mentioning of the events of May 28, 1965 prejudiced the rights of the defendants. Herein, they argue that unless this Court wishes to equate LSA-R.S. 15:456 with an informal "conspiracy" stat-

ute, something should be done to clarify the law quo ad the two aspects presented: "intent" and "continuity" of the offense or "system evidence."

One of the steps in trial is the opening statement of the district attorney explaining the nature of the charge and the evidence by which he expects to establish the same. LSA-R.S. 15:333 (See, new Code of Criminal Procedure, Arts. 765 and 766). "The underlying spirit and purpose of Article 333 of the Code of Criminal Procedure mandatorily requiring an opening statement by the district attorney is to force him to disclose the state's evidence, not only to inform the court, the jury and the defendant of what facts the state intends to prove, but in fairness to permit the defendant to adequately present his defense and avoid being taken by surprise." State v. Jones, 230 La. 356, 88 So.2d 655. In the exercise of a wise discretion, the trial judge controls the scope and extent of an opening statement, and a conviction will not be set aside for error therein unless the rights of an accused are plainly violated. State v. Clark, 231 La. 807, 93 So.2d 13. The opening statement forms no part of the evidence, has no binding force, and is designed only to give a general acquaintance with the case which will enable the jury to understand and appreciate the testimony as it falls from the lips of the witnesses. State v. Clark, supra.

In the district attorney's opening statement, we find nothing prejudicial to the substantive rights of the accused. LSA-R.S. 15:557 (See, new Code of Crim-

inal Procedure, Art. 921). The district attorney merely stated what he intended to prove during the case. He apprised the defendants of evidence he intended to introduce; this enabled their counsel to adequately prepare their defense, thus avoiding the element of surprise.

LSA-R S. 15:445 provides:

> "In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

LSA-R.S. 15:446 provides:

> "When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged."

In State v. Johnson, 228 La. 317, 82 So.2d 24, 29, we commented on rehearing that the general rule is that evidence of the commission of an offense other than the one with which a defendant is charged is not admissible. We said, however, that there are recognized

exceptions as provided by Articles 445 and 446 of the Code of Criminal Law and Procedure, such as where the evidence is introduced for the purpose of rebutting the inference that the crime charged was not committed by accident or mistake but with a guilty knowledge or evil motive, and where the evidence shows a system of wrongdoing. We further stated that it is well recognized that the exceptions to the general rule apply not only to prior criminal offenses committed by the defendant, but also to offenses committed *subsequent* to the offense charged. See, State v. Maney, 242 La. 223, 135 So.2d 473; Cf. State v. Oliver, 247 La. 729, 174 So.2d 509; State v. Butler, 249 La. 861, 192 So.2d 103; State v. Reese, 250 La. 151, 194 So.2d 729; State v. Richard, 245 La. 465, 158 So.2d 828.

Herein, a reading of the testimony attached to Bills of Exceptions Nos. 18, 19 and 21, a discussion of which we find unnecessary, discloses that the State introduced in evidence all testimony and physical evidence pertinent tc the instant bills which it had referred to in the district attorney's opening statement. Proof was submitted of all allegations. The testimony adduced and the physical evidence introduced with respect to the transactions of May 28, 1965 (these transactions allegedly took place among *some* of the defendants, not all of them) were a part of the State's proof of the guilty knowledge, intent, and system of selling and possessing narcotics of all defendants. Under such circumstances, we find that the evidence was admissible under an exception to the general rule that evidence of the commission of an offense other

than the one with which the defendants are charged is not admissible.

Bills of Exceptions Nos. 6, 18, 19 and 21 are without merit.

**BILL OF EXCEPTIONS No. 8**

Bill of Exceptions No. 8 was reserved when the trial judge sustained the State's objection to a question propounded by defense counsel to Officer Benjamin Fullington, a State witness.

Benjamin Fullington, an undercover detective with the Louisiana State Police, Detective Bureau, Narcotics, was also employed by Gulfco Finance Company at the time he was making the investigation which led to the defendants' arrest. He testified that on May 15, 1965, his superior at the finance company knew of his undercover work. He took applications for loans from Gulfco Finance Company on Skinner's Motor Mart lot, taking the applications for the defendant Skinner. He said he had seen Skinner on approximately twelve occasions prior to May 21, 1965. After testifying that he had "displaced" Ben Keenan as Manager of Gulfco, Fullington was asked:

> "Did you at or about that time, while you were there and Mr. Keenan was there, have a discussion about the loans after Mr. Keenan gave you his opinion about some of the loans you were making?"

The State objected to the above question, and, as stated supra, the objection was sustained. The witness did not answer.

We find that the evidence sought to be elicited was neither relevant nor material. We affirm the trial judge's per curiam to this bill. It recites:

> "While the State witness, Officer Benjamin Fullington, was under cross-examination, the attorney for defendants asked several questions about loans he, the witness, was making.
>
> "The State objected, stating as the reason for its objection that the question and answer would be irrelevant and immaterial.
>
> "The defendants were on trial for selling and possessing narcotics and what loans of money the witness was making was certainly irrelevant and immaterial to the issues being tried.
>
> "Attorneys for the defendants did not state at any time that their purpose was to test the credibility of the witness.
>
> "Counsel for defendants, after the objection of the State, merely stated: 'I think it's material to show his approval of the loans that were no good.' "

Bill of Exceptions No. 8 is without merit.

**BILLS OF EXCEPTIONS Nos. 11, 14 and 15**

The above bills are related and will be jointly discussed.

Bill of Exceptions No. 11 was reserved when the trial judge denied defense counsels motion for a mistrial and sustained the State's objection to questioning Ben Fullington on cross-examination with respect to a booking of defendant Gueldner on July 30, 1965 with delivery of central nervous system drugs.

Bill of Exceptions No. 14 was reserved when the trial court sustained the State's objection to the following question propounded to Sgt. Russell Hebert on cross examination:

> "Tell His Honor and the gentlemen of the jury what Mr. Gueldner was booked with when he went to the First Precinct."

Bill of Exceptions No. 15 was reserved when the trial judge ruled the police arrest book inadmissible in evidence and sustained the State's objection to the following question:

> "Does it show any complaint of a direct sale . . . Does that booking show a complaint of a sale on any date by Mr. Gueldner?"

Counsel for the defendants contend that the rulings of the trial judge were erroneous. They urge that they were unduly restrictive because counsel were

trying to show that defendant Gueldner was first booked for an offense of which he was innocent, this charge being dropped and the instant one substituted. It is further argued that Gueldner had a legal prescription for possession of central nervous system drugs.

Defendants were charged by bill of information with the possession and selling of marijuana; they were tried on the information; they were not tried for the possession or delivery of central nervous system pills. The evidence sought to be adduced was irrelevant and immaterial. The trial judge correctly stated in his Per Curiam to Bill of Exceptions No. 14 that, "What a police officer books a prisoner with at a precinct station has nothing to do with what charges the District Attorney files against the same person in Criminal District Court." Cf. State v. Young, 249 La. 1054, 193 So.2d 243.

Bills of Exceptions Nos. 11, 14 and 15 are without merit.

**BILL OF EXCEPTIONS No. 12**

Bill of Exceptions No. 12 was reserved when the trial court denied defense counsel's request for a mistrial and overruled their objections to certain testimony given by Sgt. Russell Hebert.

In his following per curiam to the instant bill, the trial judge states all of the circumstances connected

with its reservation. His ruling is correct; we agree with his reasoning.

"This bill was reserved while the State was laying the predicate for the introduction into evidence of the confession or admission against interest of the defendant, William Skinner, which was done while the jury was outside of the Courtroom.

"The police officers had testified that while they were taking William Skinner to the police station he made a statement to them, which statement was made freely and voluntarily while riding to the station in an automobile.

"William Skinner took the witness stand and testified that the statement was freely and voluntarily made by him. He further testified that he spoke to the officers, rather than the officers speaking to him.

"The Court held the statement of William Skinner to be free and voluntary and, therefore, admissible in evidence.

"***

"After the jury was returned to the Courtroom the same procedure was followed and the Court, in the presence of the jury, admitted into evidence the statement of William Skinner. Mr. Gill made his objection and reserved his bill of exception.

"It later turned out that the statement of William Skinner made to the police was not a confession or admission but, in fact, was a denial of his guilt and a threat against the police officers who took part in the investigation.

"At this time the defense moved for a mistrial on the ground that the assistant district attorney, in his opening statement, stated that he would prove that the defendant, William Skinner, had made certain oral statements, admissions, and/or confessions and that the statement by the defendant, William Skinner, was not in conformity with the statement made by the Assistant District Attorney in his opening statement.

"The Court overruled the motion for a mistrial.

"Thereupon the defense reserved a fill of exceptions to the Court's ruling.

"Later during the trial, the Court in its charge to the jury charged the jury on this point as follows:

"The law requires and obligates the District Attorney, representing the State of Louisiana, to make an opening statement explaining the nature of the charge and the evidence by which he expects to prove same. The law leaves to the counsel for the defendant the option of explaining his defense and the evidence by which he expects to establish the same, or of waiving his right to make an opening statement.

"The function and purpose of an opening statement by the District Attorney is simply to explain the nature of the charge and the evidence by which he expects to establish the same; the opening statement by counsel for the defendant is to explain the theory of the defense and the evidence by which he expects to prove same. An opening statement made by the District Attorney or the counsel for the defendant is not part of the evidence and does not prove anything at all in the case. You are to consider only the evidence in the case and the testimony of sworn witnesses who have appeared before you on the witness stand.

"Should either the District Attorney or the counsel for the defendant make statements in an opening statement and fail to substantiate them by the testimony of sworn witnesses on the witness stand, you are to place no value whatsoever upon the statement made by them, but on the contrary, you should disregard the same as if never having been uttered."

The fact that the State did not introduce oral admissions and/or confessions of defendant William Skinner, which the district attorney in his opening statement said it would do, did not prejudice the substantial rights of the defendants. "Albeit, we know of no rule of law which requires that the State offer all evidence referred to by the prosecutor in his opening statement or any jurisprudence holding that the ac-

cused necessarily suffers prejudice if he does not. Quite the contrary, it would be more logical and reasonable to conclude that the failure or inability of the State to elicit any evidence outlined in the opening statement redounds to the advantage and benefit of the accused." State v. Johnson, 226 La. 30, 74 So.2d 402. See, State v. Augustine, 241 La. 761, 131 So.2d 56.

Bill of Exceptions No. 12 is without merit.

**BILL OF EXCEPTIONS No. 23**

Bill of Exceptions No. 23 was reserved when the trial court denied defense counsel's motion for a mistrial, said motion being based on the trial judge's refusal to grant a continuance.

The circumstances connected with the reserving of this bill are to the effect that shortly before midnight, 11:40 P.M., March 21, 1966, the State rested its case. The following colloquy ensued:

"BY MR. GILL:

Before asking for a recess, I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If Your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.

"BY THE COURT:

You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight. Go to work and see if we can't finish the case tonight.

"BY MR. GILL:

I'll do what Your Honor says.

"BY THE COURT:

I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much . . . .

"BY MR. GILL:

I want to say one thing, Your Honor. I have a severe case of diabetes.

"BY THE COURT:

I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.

"BY MR. GILL:

May I further say this. I tested myself for sugar . . .

"BY THE COURT:
We will take a recess for three minutes.

"BY MR. GILL:
If Your Honor please, I respectfully request Your Honor declare a mistrial.

"BY THE COURT:
Request for mistrial is denied."

On motion for a new trial, it was alleged by counsel for Alton J. Charbonnet that defendant believes and is informed that one or more jurors were asleep during the presentation of evidence between the hours of 1:00 A.M. and 3:00 A.M., March 22, 1966, and that a new trial should be granted because the jurors were unable to give proper appreciation to the facts.

Counsel for the defendants, Skinner and Gueldner, alleged in motion for a new trial that, "* * * the Court specially erred in refusing to grant a continuance and a motion for a mistrial after the State had concluded the presentation of evidence, which was approximately 11:30 P.M. and that as observed by the Court, counsel for defendants had been asking that the matter be deferred to the following day because of counsel's physical condition, the magnitude and import of the trial and counsel's inability to properly proceed further because of his physical condition." Counsel further alleged that during the course of the introduction of testimony by the defendants at both the late hours of the night and early hours of the following

morning, some of the jurors were sleeping. Counsel still further alleged that during Mr. Gill's argument, one or more of the jurors were sleeping and that this fact was called to the attention of the court.

Since Bill of Exceptions No. 23 and the above portions of the motion for a new trial are related, we shall determine the merit of Bill No. 23 (Bill No. 23 also mentions the alleged sleeping of the jurors) and the merit of the above contention urged in the motion for a new trial hereinafter under our discussion of Bill No. 23.

It is Mr. Gill's position that reversible error was committed when the trial judge did not grant a continuance because of his alleged inability to defend his clients at the time the State rested its case. It is the contention of all defendants that the alleged sleeping of several jurors prejudiced their rights to a fair trial.

After the colloquy, supra, a thirty-five minute recess was taken, and the Court reconvened at 12:25 A.M., March 22, 1966. The jury had been to lunch at 1:05 P.M., March 21, 1966, and returned to their seats at 2:45 P.M. Court had recessed at 6:15 P.M. for dinner, and the jury returned to the courtroom at 8:00 P.M. The jury also had the thirty-five minute recess before the defense began its presentation.

The defense presented its case, resting at 2:45 A.M. March 22, 1966. During the two hours, defense counsel called seventeen witnesses (some of them were char-

acter witnesses), whose recorded testimony consumes approximately eighty-one pages. The record definitely reflects that Mr. Gill was a sick man, but it also reflects that when he questioned defendants' witnesses, he was astute, thorough and vigorous. During the taking of testimony, he reserved bills of exceptions and engaged in colloquy with the court. The record discloses no haziness on the part of Mr. Gill, nor does it reflect any lack of alertness or perception. We conclude that no matter what his physical feelings were, such feelings, as well as his physical condition, had no effect on Mr. Gill's intellectual ability between 12:25 A.M. and 2:45 A.M., March 22, 1966. His personal physician testified on the hearing of the motion for a new trial that Mr. Gill's efficiency would have been almost nil after a twelve hour period. He said that Mr. Gill had an acidotic condition due to diabetes and, of course, nervous exhaustion. We have no doubt that Mr. Gill was tired, but his efficiency contradicted his physician's testimony. It is also to be noted that the physician was not in court while Mr. Gill was presenting his defense. We find that defendants suffered no prejudice insofar as Mr. Gill was concerned.

A review of the pertinent evidence attached to the motion for a new trial constrains us to conclude that during the early hours of March 22, 1966, the jurors were cognizant of the proceedings and appreciated the facts as revealed. Wilson Landry, a juror alleged to have been sleeping, stated that he was the best judge of whether he was sleeping; he said that he was as wide awake as Mr. Gill. He said that no

deputy sheriff touched him (defense counsel contends that he had to be awakened), and that he merely had to be given water when he was coughing. Lloyd Jones, the other juror alleged to have been sleeping, testified that he did not think he was sleeping; he rested his eyes once in a while. Herbert Wilson, a juror who allegedly voted not guilty, testified that he was not asleep and saw no other jurors sleeping. Salvador Marchese, Minute Clerk of Court, testified that Mr. Landry's eyes were closed, but that he could not truthfully answer whether he was asleep. A number of witnesses for the defendants testified that some of the jurors were sleeping. These witnesses, however, were not in close proximity to the jurors. After hearing the evidence on the motion for a new trial, the trial judge concluded that the jurors were not sleeping during trial. After a reading of the evidence adduced, we agree with his conclusion.

After the defense had completed its case, court recessed until 9:30 A.M. All parties were afforded a very short period for sleeping, but the record discloses that the closing arguments were full and were not curtailed, and that the jury deliberated approximately two hours and twenty-five minutes before arriving at a verdict. We conclude that the defendants suffered no prejudice.

It is legion that the granting or refusal of a continuance rests in the sound discretion of the trial judge, and his ruling will not be disturbed except where his discretion has been arbitrarily or unrea-

sonably abused. LSA-R.S. 15:320 (now Art. 712 of the new Code of Criminal Procedure); State v. Thomas, 214 La. 499, 38 So.2d 149; State v. Jones, 249 La. 324, 186 So.2d 608; State v. Ganey, 246 La. 986, 169 So.2d 73.

Despite the facts that counsel suffered fatigue during the trial of this case and that the jury was forced to sit long hours, having little sleep, we conclude that the trial judge did not arbitrarily and unreasonably abuse his discretion in not granting a continuance. No substantial rights of the defendants were violated, nor were they prejudiced.[2]

Bill of Exceptions No. 23 is without merit.

**BILL OF EXCEPTIONS No. 24**

Bill of Exceptions No. 24 was reserved when the trial court refused to allow defense counsel to introduce in evidence a $25.00 receipt for a down payment on a 1959 Chevrolet Impala, allegedly dated May 20, 1965 and signed by defendant Gueldner, and a bill of sale for the car, allegedly dated May 21, 1965 and signed by defendant Gueldner. Both documents had been given to Virgie Niette.

[2] We agree with the following statement of the State in its brief: "The State concedes that it was hard on the lawyers involved to get only a few hours sleep on the night of March 21-22, 1966, during the trial of this case, but *how were the accused prejudiced*? Under Article 557 of the 1928 Code of Criminal Procedure, Article 921 of the present code, and the well settled jurisprudence, persons who appeal to this Court are granted a new trial only if a ruling of the trial judge has probably resulted in a miscarriage of justice, is prejudicial to the rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

The facts leading to the reservation of this bill are to the effect that Virgie Niette testified that on May 19, 1965, she went to Skinner's lot on Canal Street for the purpose of assisting her daughter, a minor, in locating an automobile for purchase. On the same day, she also went to Skinner's Gentilly lot to look at a car on which her daughter had her heart set. Mrs. Niette returned to the lot on May 20, 1965 and made a $25.00 down payment on a Chevrolet; the receipt for payment was signed by Gueldner, known to Mrs. Niette as "Richie," and by Mrs. Niette's daughter. Mrs. Niette went to the lot on May 21, 1965 for delivery of the car. She said that she arrived at the lot at 9:00 A.M. and remained there until 2:30 P.M. She testified that she received a bill of sale dated May 21, 1965; it was signed by Gueldner. Mrs. Niette's testimony with respect to the presence of undercover agent Fullington, Skinner and Gueldner on Skinner's lot is as follows:

"Q. While you were there, did you see this young man [Fullington]?

"A. No, I did not.

"Q. When you got there, with reference to Mr. Skinner and Mr. Gueldner, on May 21st, I'm speaking of—you say you got there at 9:00—when you arrived at the lot, which one of these gentlemen did you see there?

"A. Richie.

"Q. Mr. Gueldner you are referring to?

"A. Yes, sir.

"Q. Did there come a time—was Mr. Skinner there when you got there?

"A. No, he was not.

"Q. Was he there that morning?

"A. No.

"* * * *

"Q. Did there come a time when you later saw Mr. Skinner at the lot and, if so, about what time?

"A. About 1:00 in the afternoon.

"Q. Where was Mr. Gueldner all that time?

"A. He was with me.

"Q. What do you mean 'with me'?

"A. Because I was aggravating him about my automobile.

"* * * *

"Q. Where was Mr. Gueldner from 9:00 to 12:00?

"A. Sitting in the office.

"Q. With you?

"A. Right. [On cross-examination Mrs. Niette testified that Richie did not leave her presence; she stayed by his side, not giving him a chance to leave. He was with her from 9:00 A.M. until 2:30 P.M.; she was mad and aggravated.]

"Q. Mr. Fullington stand up. Did you see this gentleman there?

"A. No, I did not.

"Q. Did you see him come there and talk to Mr. Gueldner or anyone else there that morning?

"A. No, sir."

After adducing the above testimony, counsel for defendants offered in evidence the $25.00 receipt and the bill of sale, supra. The trial court refused to admit the documents in evidence, holding that they were irrelevant and immaterial.

In Bill of Exceptions No. 24, counsel for the defendants argue: "* * * * this was legal evidence of and on behalf of the defendants to show and cooperate [sic] Mrs. Niette to the effect that she did see Mr. Richard Gueldner on that day and that she was with him at all times that morning, hence he could not have been arranging for a narcotic sale and/or delivery, and that Mr. Skinner was absent and hence could not be present as related by witnesses tending to show that he had arranged for a sale of marijuana that day. That same should have been shown to the jury, which would have been proof positive in cooperation [sic] of her testimony as to events that happened on the day that the law was alleged to have been violated and which happened at a time unsuspicious and in a unsuspicious manner. And the refusal by the Court to permit the offer in evidence was tantamount to saying to a jury that the court did not believe the lady's testimony or that the receipt was a valid and truthful one."

Undercover agent Benjamin Fullington testified that he went to Skinner's lot on the morning of May 21, 1965 and told Skinner he was looking for a contact to buy marijuana. He said that Skinner made a telephone call, at which time he and Gueldner were

also present. Fullington placed himself on the lot at 11:00 A.M., May 21, 1965; his testimony is contradicted by that of Mrs. Niette, supra.

Mrs. Niette's testimony with respect to her presence on the Skinner lot, as well as her testimony with respect to her purchasing an automobile, is not contradicted. Had the documents been admitted in evidence, they would have only served as cumulative and corroborative proof of uncontradicted facts. Under such circumstances, the documents were not relevant and material. Cf. State v. Jackson, 248 La. 919, 183 So.2d 305.

Fullington's testimony, which, as stated supra, was contradicted in part by Mrs. Niette, and Mrs. Niette's testimony with respect to the parties she saw on the lot, as well as her testimony with respect to when and for how long she saw Skinner and Gueldner, went to the jury for its consideration and determination of its credibility.

We do not find that the defendants suffered any prejudice by the trial judge's ruling that the instant documents were inadmissible in evidence; nor do we find that he abused his discretion.

Bill of Exceptions No. 24 is without merit.

## BILL OF EXCEPTIONS No. 27

Bill of Exceptions No. 27 was reserved when the trial judge denied defense counsel's motion for a mistrial based on the following statement contained in the State's closing argument:

> "* * * * We seek the truth. Mr. Gill and Mr. Link have twisted phrases which, in some respects, is their prerogative in an argument because what I say and what Mr. Link and Mr. Gill have to say is purely our appreciation of the particular case that is presented to you. As jurors, though this trial has been long, you have paid attention to your witnesses. There were witnesses that were placed on the stand and there were witnesses who were not placed on the stand . . ."

Counsel for the defendants contend that the above remark was damaging to the defendants, and that the obvious impact of the statement was calling attention to the fact that the defendants Gueldner and Charbonnet had not testified. (Skinner took the stand for a limited purpose.) They argue that the State's remark could have served no other purpose, since Gueldner and Charbonnet called no witnesses on their own behalf.

In his per curiam the trial judge stated:

> "Counsel had in no manner, shape or form referred to the defendants in his statement but had referred to the witnesses.

"There were a number of witnesses both for the State and the defense subpoenaed of which eighteen (18), including the defendant, William Skinner, took the witness stand and testified, and four (4) that were not placed upon the witness stand.

"The witnesses that did not take the witness stand are the following named persons: Jack Weis, Richard Weis, David Steece and Gerald Andry.

"The Court is and was of the opinion that the Assistant District Attorney was not referring to the defendants in his remark but was simply referring to the witnesses.

"The Court is of the further opinion that the remarks of the counsel for the State complained of by the defense did not influence the jury and that the remarks did not contribute to the verdict found.

"State v. Shoemake, 78 So. 240."[3]

[3] In State v. Shoemake, 143 La. 65, 78 So. 240, the district attorney made the following remark in his argument to the jury: " 'You are called upon, gentlemen, to say whether or not under the proof in this case there is anything to Christian experience and Christianity and whether Christianity in this parish is dead.' " In holding that the remark was not objectionable, this Court stated: "The remark of the district attorney with reference to Christianity was not calculated to have any influence on the minds of the jurors, and it certainly did not contribute to the verdict found. The judge states in his per curiam to a bill of exceptions that defendant was charged with the murder of a female child some 16 years of age, yet the verdict found him guilty without capital punishment. The remark of the district attorney appears, if it had any effect, to have been favorable to the accused."

With respect to the trial judge's per curiam, counsel for the defendants argue: "This conclusion, of course, is based upon the false assumption *that the jury knew there were other witnesses who had been subpoenaed but not called.* It may well be that the Court, having access to the subpoenas, could determine what witnesses had been called. But the jury had no means of knowing this. Merely because a large group of witnesses were called in at the start of the trial (if, indeed, they ever were) this would not give the jury a sufficiently accurate run-down of the witness situation to indicate that there were any other witnesses left, except the defendants who had not testified."

Art. I, Sec. 11, La Const. of 1921, provides that no person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution. In Griffin v. State of California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229, the United States Supreme Court stated that the Fourteenth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. It held that the self-incrimination clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment. This Court has consistently held that a district attorney commits reversible error when he comments upon the failure of a defendant to take the witness stand. In the instant case, however, we do not think that the comment of the State had reference to the defendants Gueldner

and Charbonnet. We agree with the trial judge as to the import of the remark—it referred to witnesses and not to the defendants Gueldner and Charbonnet. Defendants suffered no prejudice, and reversible error was not committed. See, State v. Bentley, 219 La. 893, 54 So.2d 137; State v. Simpson, 247 La. 883, 175 So.2d 255; State v. Bickham, 239 La. 1094, 121 So. 2d 207.

Bill of Exceptions No. 27 is without merit.

**BILL OF EXCEPTIONS No. 35**

This bill will be further discussed at the end of our opinion under "Motions for a New Trial."

Bill of Exceptions No. 35 was reserved when the trial court overruled defendant Charbonnet's motion for a new trial.

In his motion for a new trial, Charbonnet contends in part that his constitutional rights, Art. I, Sec. 9, La. Const. of 1921, were violated because he was not present either in person or represented by counsel at the hearing of the motion to suppress during October, 1965.

We agree with the State that the instant bill is totally lacking in substance. The minutes of the trial court and the endorsements on the Bill of Information reflect that the present information was filed on August 11, 1965. Charbonnet and the other two defendants were arraigned on August 26, 1965; each

pleaded "Not Guilty." Gueldner and Skinner were allowed ten days in which to file pleadings, and the court ordered Charbonnet to return on September 2, 1965 to determine counsel. On September 2, 1965, Charbonnet was granted time until September 10, 1965 to obtain counsel. He evidently did not secure counsel, and, on September 20, 1965, the trial court appointed Joseph Monie, Esq., to represent the defendant Charbonnet; thereafter, he was never without counsel. On October 8, 1965, the appointment of Monie was rescinded, and Bentley Byrnes, Esq., was appointed as counsel for Charbonnet. The appointment of Byrnes was rescinded on January 11, 1966, and Maurice Burk, Esq., was appointed counsel for Charbonnet. On this same day, Robert Link, Esq., filed a Motion for Reduction of Bail as to Alton Charbonnet. On January 18, 1966, the trial court rescinded the appointment of Burk and appointed Link to represent Charbonnet in any further proceedings; Link fulfilled and is fulfilling the assignment.

During the fall of 1965, court appointed counsel for Charbonnet filed no preliminary pleadings. It was during this time that counsel for Skinner and Gueldner filed the Motion to Suppress and Dismiss. The motion makes no mention of Charbonnet; it alleges, "Now comes your defendants, William R. Skinner and August R. Gueldner." Counsel for Charbonnet and Charbonnet himself did not appear at the trial of the motion, but, on January 31, 1966, the trial court granted Mr. Link's Motion to Obtain Transcripts of

Preliminary Hearing and other proceedings previously held for co-defendants. Mr. Link took no further action; trial ensued on March 21-22, 1966. Mr. Link joined with Mr. Gill, counsel for Skinner and Gueldner, during the course of trial. It was only after trial that he made the present complaint with respect to defendant Charbonnet's alleged rights.

It is true that the minutes of court must show that the accused was present at every important stage of the trial for a felony from the moment of his arraignment to his sentence, State v. Pepper, 189 La. 795, 180 So. 640; State v. Breedlove, 199 La. 965, 7 So. 2d. 221, but, as stated supra, defendant Charbonnet pleaded "Not Guilty," and was thereafter represented by counsel. His counsel did not file a Motion to Suppress. Under such circumstances, we conclude that it was not imperative that he be present at the trial of the Motion to Suppress and Dismiss filed by defendants Skinner and Gueldner. Charbonnet suffered neither prejudice nor violation of his constitutional rights.

Bill of Exceptions No. 35 is without merit.

**BILL OF EXCEPTIONS No. 29**

Bill of Exceptions No. 29 was reserved when the trial judge overruled defendants' objection to the trial judge's charge on "Conspiracy." The objection was made by Mr. Gill, who stated:

> "I respectfully object to Your Honor's charge on conspiracy, both as to its tenor and applica-

bility in this case. I object to Your Honor's charge on confessions and inculpatory statements and on circumstantial evidence as regards conspiracy and also with reference to system."

In our original opinion, we recited in its entirety the trial judge's charge with respect to "Conspiracy." We find no need for reiteration herein. We correctly said that it contains a full statement relative to the law of conspiracy.

Counsel for the defendants objected to the conspiracy charge both as to its tenor and applicability in this case. In our original opinion, as stated supra, we found that the objection had merit. After reconsideration, we now find that the trial judge did not abuse his discretion in giving the conspiracy charge, and that defendants' objections do not show that he committed reversible error.

We originally relied on the cases of State v. Gunter, 208 La. 694, 23 So.2d 305, and State v. Fletcher, 236 La. 40, 106 So.2d 709. These cases only hold that the trial judges therein committed no error in refusing to give conspiracy instructions to the jury. We do not find that the cases provide authority for the present decision.

In the Fletcher case we did say that: "The request to include a statement concerning the law of conspiracy in the general charge was likewise properly denied as being irrelevant. Appellant was charged

with the substantive offense of possessing narcotics and not with the separate and distinct crime of a conspiracy to possess them, which is composed of different elements." It must be noted that only one defendant, George Fletcher, was charged. The trial judge, as found by this Court, did not commit reversible error in refusing to give the conspiracy charge.

The Gunter case involved three defendants, Jeff Gunter, Wilson Hargraves and Henry Murray. They were charged by bill of information with the offense of simple kidnapping. Murray pleaded guilty and was used as a state witness; Hargraves and Gunter were jointly tried. In the body of this Court's opinion, we find the following statement:

> "The defendants in this case were jointly charged with the offense of simple kidnapping under Article 45 of the Criminal Code. They were charged as principals and not as conspirators. Murray was an accomplice in the crime, and his testimony consisted merely of a recital of the various acts done by each defendant in the perpetration of the crime."

This Court affirmed the conviction of Gunter but set aside that of Hargraves, finding that the trial judge had abused his discretion under the facts disclosed in not appointing a lunacy commission to determine the issue of present insanity. We thus find that this Court affirmed the conviction of only one defendant. There-

fore, even though the trial judge refused to instruct the jury with respect to conspiracy and we approved his action, we cannot say that the case lends support to the instant defendants' contentions. It is not apposite.

> "Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.
>
> "Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.
>
> "* * *" LSA-R.S. 14:26. Cf. 31A C.J.S., Sec. 362 et seq.

It has been held under the jurisprudence of this Court that where an indictment charges that the crime was committed by two or more persons, such an indictment necessarily involves a conspiracy. Cf. State v. Ford, 37 La.Ann. 443; State v. Dundas, 168 La. 95, 121 So. 586; State v. Gunter, 180 La. 145, 156 So. 203; State v. Gebbia, 121 La. 1083, 47 So. 32; State v. Capaci, 179 La. 462, 154 So. 419; State v. Melerine, 236 La. 929, 109 So.2d 471.

Herein, the State offered evidence seeking to prove a conspiracy among three people jointly charged with

possessing and selling marijuana. It was properly admitted and ruled admissible. State v. Gebbia, supra; State v. Brasseaux, 163 La. 686, 112 So. 650; State v. Robichaux, 165 La. 497, 115 So. 728; State v. Terrell, 175 La. 758, 144 So. 488; 16 Am. Jur. 2d. Conspiracy, Sec. 37, p. 147; Wharton's Criminal Law and Procedure, Vol. IV, Sec. 1779, p. 591. Cf. LSA-R.S. 15:455. It is also to be noted that in his per curiam to Bill of Exceptions No. 19, the trial judge states, "The State had already established that the three defendants on trial had conspired together to sell marijuana to Officer Fullington on May 21, 1965." Cf. State v. Turner, 392 P.2d 863.

The question of whether a conspiracy had been established was a question of fact for the jury. Therefore, the jury had to be instructed on the law of "Conspiracy."

> "While it is error to submit the question of conspiracy if there is no evidence thereof, where there is evidence that the defendants had entered into a conspiracy to commit the crime charged, an instruction on the law of conspiracy is proper, and this, even though the indictment or information may not charge a conspiracy." 53 Am. Jur., Trial, Sec. 673, p. 519.

> "Even though Congress has created a separate crime of conspiracy, it is settled that joint participators in the commission of the substantive offenses may be denominated as conspirators.

Kumpe v. United States, 250 F.2d 125 (C.A. 5, 1957). The conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime. 16 Am. Jur. 2d, Conspiracy, Sec. 38, p. 147[4] (1964).

"It was the function of the Court to define the term 'conspiracy' and to instruct the jury as to the circumstances under which the out-of-court statements were admissible." United States v.

---

"Declarations and acts of one conspirator pursuant to or in furtherance of the conspiratorial purpose are admissible in evidence against any other member of the conspiracy if there is at least prima facie proof of the conspiracy alleged by the prosecution. Admissible under this rule and subject to its requirements are books and records used by a coconspirator and, in a prosecution for conspiracy to commit subversive acts, a subversive newspaper published by one of the conspirators. *This rule is applicable in a prosecution for a substantive crime where conspiracy is incidentally involved as well as in a prosecution for the crime of conspiracy itself.* The rule applies whether or not the coconspirator whose declarations are put in evidence is a codefendant of the conspirator on trial. The evidence is admissible against an original conspirator and also against one who joined the conspiracy after its inception.

"* * * *" 16 Am. Jur. 2d, Extrajudicial declaration or act of coconspirators, Sec. 38, p. 147. (Emphasis supplied.)

See, also, 23A C.J.S., Criminal Law, Sec. 1287, Conspiracy, p. 692, to the effect: "Where there is evidence relating to conspiracy in committing the offense, an instruction as to such law is proper, but where the evidence does not show a conspiracy, an instruction as to such law is erroneous, and need not be given, nor need an instruction as to abandonment of the conspiracy be given where there is no evidence of such withdrawal. Where no conspiracy is shown, the court should instruct that accused could not be convicted unless he personally committed the crime charged. On the other hand, where the state's theory is that a conspiracy existed, an instruction that mere presence at the commission of the crime, although such presence is for the purpose of aiding in the commission thereof, is insufficient to constitute guilt, if no actual aid or encouragement is rendered the principal, is properly, refused as ignoring the issue of conspiracy."

Hoffa, 349 F.2d 20, 41, affirmed, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374. See, 66 A.L.R. 1311; State v. Capaci, 179 La. 462, 154 So. 419.

Herein, it was the duty of the trial judge to charge the jury on the law applicable to the instant case and to charge the jury that it was their duty to accept and apply the law as laid down for them by the judge. LSA-R.S. 15:385 (new Code of Criminal Procedure, Art. 802). After our present study of this matter and further research of the jurisprudence, we conclude that the conspiracy portion of the charge complained of in Bill of Exceptions No. 29 did not constitute an abstract, inapplicable discourse on the law of "Conspiracy," and was proper.

The rights of the accused were not prejudiced by the charge. In rendering the charge on the law of "Conspiracy," the trial judge neither abused his discretion nor committed reversible error.

Bill of Exceptions No. 29 is without merit.

**MOTIONS FOR A NEW TRIAL**

As stated supra, counsel for defendant Charbonnet and counsel for defendants Skinner and Gueldner filed separate Motions for a New Trial.

In our determination of some of the bills of exceptions, supra, we ruled on certain contentions contained in the Motions for a New Trial and found that they

were without merit. We have now considered all of the remaining allegations and contentions of the Motions for a New Trial and find that they set forth nothing new for our consideration. All matters urged and not abandoned in this Court were discussed in the bills of exceptions, supra.

For the reasons assigned, the convictions and sentences are affirmed.

McCALEB, J., concurs in the decree, being now convinced as to Bill No. 29 that, with the exception of State v. Gunter, 180 La. 145, 156 So. 203, the jurisprudence of this Court is well settled that the judge is obliged to give a charge on conspiracy in prosecutions for a crime committed by two or more persons.

HAMITER, J., dissents, he adhering to the written reasons assigned by him on the original hearing.

## APPENDIX B.

### ARTICLE 292—WEST'S CODE CRIMINAL PROCEDURE.

"Before the finding of an indictment or the filing of an information the court, on request of the state or the defendant, *shall* immediately order a preliminary examination in felony cases.

*After the finding of an indictment or the filing of an information an order for a preliminary examination may be granted by the court at any time,* either on its own motion or on request of the state or the defendant." (Emphasis added.)

Note: Article 295 of the Louisiana Code of Criminal Procedure provides that any evidence taken at a preliminary hearing may be later used at trial if a witness is ill, absent or deceased.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 17 1968
JOHN F. DAVIS, CLERK

No. 44

# In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET

v.

STATE OF LOUISIANA

**On Petition for Writ of Certiorari to Review Decision of the Supreme Court of Louisiana in State of Louisiana vs. William Skinner, et al., No. 48,445 on the Docket of that Court**

## RESPONSE OF STATE OF LOUISIANA, RESPONDENT

JACK P. F. GREMILLION,
Attorney General of the
State of Louisiana.

JIM GARRISON,
District Attorney
for the Parish of Orleans.

LOUISE KORNS,
Assistant District Attorney
for the Parish of Orleans.

No. 1210

# In the Supreme Court of the United States

OCTOBER TERM, 1967

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET

v.

STATE OF LOUISIANA

**On Petition for Writ of Certiorari to Review Decision of the Supreme Court of Louisiana in State of Louisiana vs. William Skinner, et al., No. 48,445 on the Docket of that Court**

## RESPONSE OF STATE OF LOUISIANA, RESPONDENT

## STATEMENT OF THE CASE

On May 21, 1965 Benjamin Fullington, an undercover agent with the Louisiana State Police, went to Skinner's Motor Mart, 2101 Canal Street in New Orleans, and told William Skinner, owner of the mart, and August Gueldner, a car salesman, two of the relators herein, that he was looking for a contact from whom he could buy marijuana. Either Gueldner or Skinner made a phone call, after which Fullington was informed that the pusher (seller) would be at the lot that afternoon. The agent left and returned around 8

in the evening, at which time Skinner introduced Fullington to Alton Charbonnet, alias Joe Jackson, the third relator in this proceeding. Charbonnet told the agent that the stuff (marijuana) was under the seat of a white 1960 Lincoln parked on the lot, whereupon Fullington paid Charbonnet $20, went to the car indicated, and found under the front seat a matchbox filled with marijuana.[1] R. 419-487.

On July 30, 1965 Skinner, Gueldner and Charbonnet were arrested, R. 492-493, and shortly thereafter all three were jointly charged in the first count of a bill of information with selling marijuana to Ben Fullington, and in a second count with unlawfully possessing marijuana. R. 22-23; see La. R.S. 40:962.

The accused pleaded not guilty, were tried, and were found guilty as charged on both counts. They appealed to the Louisiana Supreme Court. Although thirty-five bills of exception were reserved and perfected in the trial court, the accused relied in the Louisiana Supreme Court on six "specifications of error", involving bills numbers 6, 18, 19, 21, 23, 24, 29 and 35. On original hearing the Louisiana Supreme Court completely ignored the established jurisprudence of Louisiana and other jurisdictions and

---

[1]On p. 23 of their brief relators cite as proof of Mr. Gill's "illness and exhaustion" the fact that he "had failed to call a key witness for the defense, a party who was to testify as to the true ownership of the automobile in which the marijuana was allegedly found." The ownership of the car parked in the lot in which Charbonnet momentarily hid the marijuana was clearly irrelevant, which is obviously why defense counsel did not bother calling a witness to testify on this point.

set aside the convictions and sentences herein on the ground that bill of exception number 29 was meritorious because the trial judge erred in charging the jury on the law of conspiracy. See *State v. Skinner*, 251 La. 300, 204 So.2d 370, particularly dissents of Sanders and Hawthorne, JJ., at 204 So.2d 377-380.

On application of the State of Louisiana a rehearing was granted and the convictions and sentences of Skinner, Gueldner and Charbonnet were affirmed. See 204 So.2d 380-394.

Relators are now applying to this Honorable Court for a Writ of Certiorari to review the decision of the Louisiana Supreme Court in this matter on rehearing. Relators rely in this Court on three allegations of error involving bills of exception numbers 23, 29 and 35.

## ARGUMENT

### 1. The Absence of Charbonnet From the Hearing of Skinner's and Gueldner's Preliminary Motions

This allegation of error involves bill of exception number 35, which was reserved by Alton Charbonnet when the trial judge overruled his Motion for a New Trial. R. 108, 388-390.

### A. Standing To Raise

This particular allegation of error can obviously be urged only by Charbonnet, as Skinner and Gueldner can claim no possible prejudice to themselves arising from the absence of Charbonnet at the hearing of their pre-trial motions. Skinner and Gueldner could have

subpoenaed Charbonnet, who had been unable to make bond, to appear at these hearings had they so wanted, but Skinner and Gueldner clearly did not want Charbonnet to be present because at this early stage of the proceedings Skinner and Gueldner were trying to disassociate themselves completely from Charbonnet, who had told the undercover agent that the marijuana was under the seat of a car parked on Skinner's lot and who was paid $20 by the agent for the "stuff". See R. 42-64, esp. R. 62. Skinner's and Gueldner's only hope, as they viewed the matter prior to their trial and conviction, was to repudiate Charbonnet, the most active member of the trio.

**B. Charbonnet Suffered No Prejudice**

The minutes in this case show that on August 26, 1965 Alton Charbonnet pleaded not guilty to the charge of sale and possession of marijuana, as did Skinner and Gueldner, and the trial judge ordered Charbonnet to return September 2, 1965 so that the matter of counsel could be determined. On September 2, the matter of Charbonnet's counsel was continued to September 10, 1965, apparently on motion of Charbonnet. R. 1. Hurricane Betsy struck New Orleans and the matter was further delayed. R. 1. On September 20, 1965, Charbonnet having informed the court that he was unable to employ counsel, the trial judge appointed attorney Joseph Monie to represent Charbonnet in this case, R. 2, and from this date on Charbonnet was never without counsel. For reasons of health Monie withdrew as Charbonnet's counsel and the trial judge

appointed attorney Bently Byrnes to represent Charbonnet. Byrnes became seriously ill (he died shortly thereafter), and on January 11, 1966 the court appointed attorney Bernard Burk as Charbonnet's attorney, R. 4. On January 18, 1966 Charbonnet engaged Robert Link, his present attorney, to represent him. R. 5. Apparently because of illness none of the court appointed attorneys filed any pleadings on Charbonnet's behalf. See R. 104.

Meanwhile, on September 21, 1965, the day following Monie's appointment as Charbonnet's attorney, Mr. G. Wray Gill, who had been employed by Skinner and Gueldner to represent them in this case, filed on behalf of Skinner and Gueldner only a Motion for Bill of Particulars; a Motion for Preliminary Examination; a Motion to Quash; a Motion to Quash Application for Search Warrant, Search Warrant itself and the Return on Said Search Warrant; a Motion to Suppress and Dismiss; a Prayer for Oyer; and a Special Plea of Entrapment. R. 2, 34-40, 66-72, 101. Counsel for Charbonnet chose not to join in these pleadings, nor did he file similar pleadings on behalf of his client.

On September 28, 1965 the State of Louisiana, in response to the pleadings filed by Skinner and Gueldner, filed an Answer to the Motion to Quash; a Bill of Particulars; an Answer to the Special Plea of Entrapment; and an Answer to the Motion to Quash Application for Search Warrant, Search Warrant itself and Return of Said Search Warrant. R. 3.

On this same day, September 28, 1965, Mr. Gill *withdrew his Motion to Quash Application for Search Warrant, Search Warrant Itself, and Return on Said Search Warrant*, R. 3, for the reason that on the hearing of the Motion to Suppress it developed that at the time the Louisiana State Police searched Skinner's Motor Mart pursuant to a search warrant following the arrest herein, *nothing was found by the police in the mart and thus there was nothing to suppress.* R. 148. It should be remembered that the matchbox of marijuana which was offered in evidence by the State of Louisiana during the trial of this case had not been seized during a search, but rather had been purchased by undercover agent Fullington from Charbonnet on Skinner's car lot, with the aid and consent of Skinner and Gueldner. See R. 419-425.

The trial judge ruled the State of Louisiana's Bill of Particulars and Answer to Motion to Quash to be good and sufficient in law, R. 3; the Special Plea of Entrapment was overruled, R. 3, and it is important to note that the factual issue of entrapment is not for the judge to determine prior to trial but is a question for the jury as part of its function of determining the guilt or innocence of the accused. See *Sherman v. United States*, 356 U.S. 369 (1958).

On October 8, 1965 the trial judge heard the Motion for Preliminary Examination filed by Skinner and Gueldner for the sole purpose of determining whether the State of Louisiana had sufficient evidence to make out a prima facie case against Skinner and

Gueldner.[2] See R. 38-39; see Arts. 154-155 of Louisiana's 1928 Code of Criminal Procedure, dealing with Preliminary Examination. At the conclusion of this hearing the judge held that the State of Louisiana had made out a prima facie case *as far as these two accuseds were concerned*, and bound them over for trial. ("I do feel the State has made a prima facie case, however, as far as these two defendants are concerned." R. 64) R. 4, 64; see Art. 155 of Louisiana's 1928 Code of Criminal Procedure. On the same day the State of Louisiana filed an Answer to Prayer for Oyer, which the trial court ruled was good and sufficient in law. R. 4.

On January 18, 1966 Charbonnet decided not to rely on court-appointed attorneys (who because of illness had been able to do nothing on his behalf) and engaged Robert S. Link, his present attorney, to represent him. R. 5.

---

[2]It is important to note here that Skinner, Gueldner and Charbonnet were at this time charged in separate bills of information with both sale and possession of marijuana under La. R.S. 40:962 and *conspiracy to sell and possess marijuana* under Article 26 of the Louisiana Criminal Code, both of which charges were based on the same facts and circumstances. Both the sale and possession case (the instant one) and the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Thus, it was quite proper for the trial judge to state at the end of Preliminary Examination, R. 64, that the State of Louisiana "has made a prima facie case of a conspiracy to sell narcotics," because the Preliminary Hearing which had just been held involved both the instant sale and possession case and also the conspiracy case.

On January 31, 1966 Mr. Link filed a Motion in the trial court in which motion, see R. 104-105, it is alleged that neither Alton Charbonnet nor any of his attorneys were present at the hearings of the various preliminary pleas which had been filed on behalf of Skinner and Gueldner, and the trial court is asked to make available to Charbonnet's attorney the transcript and/or record of all prior proceedings to

> "permit him to determine whether it is necessary to file supplemental motions in his own behalf and that a minimum of 30 days delay be granted in order for defense counselor to properly study and evaluate the record already taken in these matters *in order to file such pleadings as may be necessary in behalf of your defendant* ALTON J. CHARBONNET." R. 104-105.

The same day as the above motion was filed, the trial judge ordered that the transcripts requested be furnished to Mr. Link. ("The Court . . . ordered the Court Reporter to furnish any and all transcripts to Mr. Link." R. 5)

However, although the pleadings and transcripts requested were promptly given to Mr. Link, and the trial in the present matter did not take place until March 21-22, 1966—almost two months later—Mr. Link filed no motions or pleadings of any kind on behalf of Charbonnet, nor were any pre-trial hearings for Charbonnet requested by him. From this inaction on Mr. Link's part we can only infer that after studying and evaluating the pleadings, transcript, etc., he decided that his client's rights had been fully pro-

tected in every way, and that no further motions needed to be filed on Charbonnet's behalf. Also, the trial judge's action in delaying the trial for two months at the request of Mr. Link indicated the willingness of the trial court to entertain and hear any pleas, motions, etc., which Charbonnet might have wished to file prior to trial.

Furthermore, Mr. Link made no objection prior to trial, or at any time during trial, to Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner, and no prejudice to Charbonnet because of this absence was at any time called to the trial court's attention.[3] It was only after the trial was finished and Charbonnet had been found guilty by the jury that Mr. Link, in a Motion For New Trial, *for the first time* complained to the trial judge of Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner. See R. 108.

It is settled in the jurisprudence of Louisiana, and elsewhere, that an accused need not be present during the hearing of preliminary motions addressed to the court, and not making part of the actual trial of the guilt or innocence of the accused. *State v. Basco*, 216 La. 365, 43 So.2d 761; *State v. Pierre*, 39 La.Ann. 9, 3 So. 60; *State v. Fahey*, 35 La. Ann. 9; 5 Wharton, Criminal Law and Procedure 141, sec. 2005 (Anderson, 1957); compare Articles 831, 834 of the present

[3]In fact, Mr. Link used the transcript of the testimony offered at Skinner's and Gueldner's Preliminary Examination to cross-examine witnesses who testified at the trial of this case. See, e.g. R. 481-482.

Louisiana Code of Criminal Procedure and Comments thereunder ("the defendant's presence is not required when motions are made and determined by the court outside of the jury's presence").

The State of Louisiana's position on this issue is: first, that the presence of Charbonnet was not required during the hearing of the various pre-trial motions filed by Skinner and Gueldner in the instant case, as the question of Charbonnet's guilt or innocence was not involved therein, nor was there any ruling on the admissibility of evidence to be used at the trial; second, the State of Louisiana is of the respectful opinion that Charbonnet has waived all rights in the matter because the trial court at defense counsel's request furnished Mr. Link with copies of all pleadings and transcript of all evidence involved in these preliminary matters, and allowed Mr. Link two months prior to trial in which to file any pleadings which Mr. Link thought necessary on behalf of Charbonnet; and third, any error, if it occurred, was harmless, because at no time has Mr. Link pointed out how Charbonnet was prejudiced or how he suffered any unfairness because of his absence from these pre-trial hearings.

### 2. The Judge's Charge To the Jury On the Law of Conspiracy Was Correct

This allegation of error is grounded on bill of exception number 29. R. 252-253.

Article 385 of Louisiana's 1928 Code of Criminal Procedure, which was in effect during the trial of the

instant proceeding, provides that the trial judge shall charge the jury on the law applicable to the case. See also Art. 802 of Louisiana's 1967 Code of Criminal Procedure.

It is well settled in the Louisiana jurisprudence that a trial judge must charge the jury on every phase of a criminal case which is supported by the evidence, and that failure of the judge to do so amounts to reversible error. *State v. Youngblood*, 235 La. 1087, 106 So.2d 689.

In the instant case Skinner, Gueldner and Charbonnet were jointly charged in two counts of a bill of information with possessing and selling marijuana.[4] R. 22-23. It is settled in Louisiana that where an information charges two or more persons jointly with a crime, *the charge involves a conspiracy* although the information does not expressly charge conspiracy in formal terms. *State v. Robichaux*, 165 La. 497, 115 So. 728; *State v. Terrell*, 175 La. 758, 144 So. 488;

[4]As was pointed out in footnote 2, Skinner, Gueldner and Charbonnet were also charged in a separate bill of information with conspiracy to sell and possess marijuana under Article 26 of the Louisiana Criminal Code, the conspiracy charge being based on the same facts and circumstances as the sale and possession charge. Both the sale and possession case (the present one) and the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Further, the Preliminary Hearing which was held on behalf of Skinner and Gueldner involved both the instant sale and possession case and the conspiracy case, although the present sale and possession case was tried separately from the conspiracy charge, which has never been tried.

*State v. Melerine*, 236 La. 929, 109 So.2d 471. Hence the instant charge of sale and possession against Skinner, Gueldner and Charbonnet involves a conspiracy under Louisiana law (and under the law of most other jurisdictions).

During the instant trial, frequent objections to testimony were made by Mr. Gill on behalf of Skinner and Gueldner on the ground that the conversation, act, etc., referred to by the witness occurred out of the presence of his clients, and that conspiracy had not been charged in the bill of information herein. See, *e.g.*, bill of exception number 19, R. 206. The trial judge correctly overruled all such objections on the basis that the bill of information herein jointly charges the 3 accused with possessing and selling marijuana, that the State of Louisiana had made out a prima facie case of conspiracy, and that consequently the evidence was admissible under La. R.S. 15:455, which provides that each co-conspirator is deemed to commend whatever is said or done in furtherance of the common enterprise, and it is of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, but to have this effect a prima facie case of conspiracy must have been established. R. 209.

The trial judge's ruling was in accord with the settled jurisprudence of the Louisiana Supreme Court. See *State v. Gebbia*, 121 La. 1083, 47 So. 32; *State v. Brasseaux*, 163 La. 686, 112 So. 6501; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Gunter*, 180 La. 145, 156 So. 203; *State v. Melerine*, 236 La. 929, 109

So.2d 471; see also Marr's Criminal Jurisprudence of Louisiana, vol. 2, p. 848 (2d ed. 1923).

In giving his charge to the jury in the instant case the trial judge instructed the jury in detail on the definition and nature of conspiracy, told the jurors that it was for them to determine, from the evidence, whether or not a conspiracy had been established by the State of Louisiana, and that unless they were satisfied that a conspiracy had been shown, "I charge you that the acts and declarations of one of the parties to the alleged conspiracy do not bind the others".[5] R. 356-359.

In charging the jury in the present case on, among other things, conspiracy, the trial judge was following the mandate of Article 385 of Louisiana's 1928 Code of Criminal Procedure and the unquestioned rulings of the Louisiana Supreme Court. See *State v. Taylor*, 173 La. 1002, 139 So. 325; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Capaci*, 179 La. 462, 154 So. 419.[6]

---

[5]In their Petition for Certiorari filed in this Court petitioners contend that they were prejudiced by the judge's charge to the jury on conspiracy. The State of Louisiana believes that the contrary is true, and that the judge's admonition to the jury not to impute the acts and declaration of one of the 3 accused to the other 2 unless a conspiracy had been proved beyond a reasonable doubt, was helpful to the accused, if anything, and certainly not prejudicial.

[6]In reversing the conviction on first hearing on the ground that the trial judge erred in charging the jury on conspiracy, the Louisiana Supreme Court relied on its decisions in *State v. Fletcher*, 236 La. 40, 106 So.2d 709; and *State v. Gunter*, 208 La. 694, 23 So.2d 305, which are contrary to the

This Court's attention is directed to the fact that it is the prevailing rule *in all jurisdictions* that where there is evidence that the accused have entered into a conspiracy to commit the crime charged, an instruction to the jury on the law of conspiracy is proper, *even though the indictment or information does not formally charge a conspiracy.* See 53 Am.Jur., Trial, sec. 673, p. 519; 23A C.J.S., Criminal Law, sec. 1278, p. 692.

The trial judge acted correctly in charging the jury herein on the law of conspiracy, in the respectful view of the State of Louisiana.

**3. No Prejudice to the Accused Resulted Because the Trial Lasted Until 2:45 A.M. the First Day And Started Again at 9:30 the Following Morning**

This allegation of error centers around bill of exception number 23. R. 221-228.

The trial of the instant case began on the morning of March 21, 1966. R. 6. After the jury had been selected the court ordered a recess for lunch. R. 7. At 2:45 p.m. the jurors returned to their seats in the jury box and the court ordered the trial to proceed. R. 7. From 6:15 to 8 p.m. there was a recess for dinner. R. 9. At 11:40 the State rested its case. R. 11. At this time defense counsel complained of feeling tired and asked for a recess. R. 604.

---

great weight of the Louisiana jurisprudence on this point, and which simply hold that it was not reversible error in those particular cases for the trial judge to fail to charge the jury on conspiracy.

BY THE COURT: You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight. Go to work and see if we can't finish the case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much . . .

BY MR. GILL: I want to say one thing, Your Honor. I have a severe case of diabetes.

BY THE COURT: I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.

BY MR. GILL: May I further say this. I tested myself for sugar . . .

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please, I respectfully request Your Honor declare a mistrial.

See R. 604-605.

To the overruling of his Motion for a Mistrial Mr. Gill reserved bill 23. R. 604-605, 221.

The defense then took a recess of thirty-five minutes and proceeded to put on its case from 12:25 a.m. until 2:45 a.m., when the defense rested. R. 12, 605-

688. During these two hours and twenty minutes Mr. Gill called to the stand Thomas Cardona, R. 606-611; James Comeaux, R. 611-613; Joseph Marino, R. 613-618; Hugh Wilbourn, R. 618-619; Marie Wilbourn, R. 620-621; Gilbert Andry, R. 621-624; Floyd Russell, R. 624-626; Virgie Niette, R. 626-639; Helaine Harp, R. 639-647; Bobbie Moffett, R. 648-652; Walter Gordon, R. 652-658; Bernard Sweeney, R. 659-660; Alfred Middleton, R. 660-662; Mrs. Charles Arbour, R. 662-667; Charles Arbour, R. 667-671; Bernard Keenal, R. 671-680; and Stevánna Stevens, R. 680-687.

The defense rested at 2:45 a.m., court recessed a little before 3 a.m., and reconvened at 9:30 the following morning. R. 687, 12. When court reconvened the next morning Mr. Gill and Mr. Link made their closing arguments to the jury on behalf of the accused and the trial judge charged the jury, which then retired to deliberate at 2:45 p.m. At 5:10 p.m. the jury announced to the court their verdict of guilty as charged on both counts as to all three of the accused. R. 12-13.

Under Article 320 of Louisiana's 1928 Code of Criminal Procedure, the granting or refusing of a continuance (or recess as it is called after the trial has begun, according to Article 708 of the 1967 Code) is within the sound discretion of the trial judge. It is well settled that the trial judge's refusal to grant a continuance or recess will not be reversed on appeal unless his ruling is found to be arbitrary and prejudicial. See *State v. Ganey*, 246 La. 986, 169 So.2d 73; *State v. Jones*, 233 La. 775, 98 So.2d 185; *State v. Forsyth*, 229 La. 690, 86 So.2d 536.

The State of Louisiana concedes that it was hard on the lawyers involved to get only a few hours of sleep on the night of March 21-22, 1966, during the trial of this case, but *how were the accused prejudiced?*

As the record herein bears out, Mr. Gill and Mr. Link called seventeen witnesses and put on a vigorous defense on the night of March 21-22. On the morning of March 22 Mr. Gill and Mr. Link made spirited arguments to the jury on behalf of the three accused—Mr. Gill's closing argument lasted for about an hour and a half. And during this time the defense reserved 8 bills of exception (bills 23-30).

Petitioners argue to this Court that the trial judge should have granted a recess at 11:40 p.m. on the first day of the trial because Mr. Gill was ill and tired. The answer to this contention is that Mr. Gill nevertheless conducted a competent defense in this case. If the contrary situation had prevailed, and Mr. Gill, or his associate, had not been able to adequately defend the accused, the trial judge would undoubtedly have called a recess before 2:45 a.m.

In *Mende v. United States*, 282 F.2d 881 (9th Cir. 1960), trial counsel requested a continuance because of a facial affliction. In finding no abuse of discretion on the part of the trial judge who denied the continuance, the Court of Appeals for the Ninth Circuit said: "The transcript indicates that this trouble did not affect the quality of counsel's mental activity."

It was held in *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641, cert. denied 323 U.S. 757, 65 S.Ct. 91,

89 L.Ed. 606, that since it appeared from the record that defense counsel was vigorously active in behalf of his client and fully protected his interest throughout the trial, there was no abuse of discretion in denying a continuance requested because of counsel's health.

In *Day v. State*, 123 Tex.Crim. 9, 57 S.W.2d 581, in approving the refusal of a continuance where it had been claimed that the accused's attorney was suffering from a throat infection making it difficult for him to talk, the court noted the trial judge's statement that the defense was conducted very ably and that there was no difficulty in hearing counsel.

It was held in *Lewis v. State*, 125 Tex.Crim. 66, 65 S.W.2 771, that there was no error in refusing a continuance where an attorney who claimed to have been so ill as to be unable to properly represent his client appeared at the trial, ably presented the case, examined the witnesses and argued to the jury, showing no effects of his alleged illness.

For a discussion of the above cases and others on the same point, see Anno: Continuance—Counsel—Illness or Death, 66 A.L.R.2d 267, 275-279 (1959).

As for the contention raised *for the first time in Motion For a New Trial* that a couple of the jurors had fallen asleep during the trial, this Court's attention is directed to the fact that no objection to sleeping jurors was made at the trial. Mr. Gill admits that he made no such objection during trial, excusing himself on the ground that he was too tired to object at the time. R. 323. However, we note that Mr. Gill was not

too tired at this time to call and examine 17 defense-witnesses, argue to the jury for an hour and a half and reserve eight other bills of exception (bills 23-30). Further, all of the jurors who testified at the hearing of the Motion For a New Trial *categorically denied that any member of the jury had at any time been asleep during the trial.*

The evidence taken at the hearing on the Motion For New Trial shows that all of the jurors who testified vehemently denied that they or anyone else had been asleep during any part of the trial. According to the jurors who testified at this hearing, they had been alert and interested in the case at all times. R. 259-281, 36-367.

Furthermore, the record herein shows that on the night in question the trial judge asked the jurors whether they would prefer to work late or to recess early and come back, and that the jurors said that they would rather "work through and finish the case." R. 268-269, 347-348.

It is not as though the attorneys and the jury in the instant case were required to work night after night and day after day with little or no sleep. The episode complained of amounted to *one night;* the trial was finished by the afternoon of the following day. Surely adult men can miss a little sleep one night without having their faculties impaired. And if defense counsel is not hardy enough to stand the pace, the remedy is for him to have an associate help him with the trial when he becomes tired.

Moreover, the record in this case shows that Mr. Gill had *already been granted a great number of continuances* in the trial of the present matter. On January 18, 1966, on motion by defense the matter was continued until January 31, 1966. R. 5. On January 31, 1966, on motion by Mr. Gill the matter was continued until February 24, 1966. R. 5. On February 24, 1966, on motion by the defense the court ordered the case continued until March 15, 1966. R. 6. On March 15, 1966, on motion by defense the proceeding was continued until March 21, 1966. R. 6. As the trial judge told Mr. Gill when refusing to grant him a continuance at 12 midnight on March 21, 1966, "I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case." R. 605.

The State of Louisiana calls this Court's attention to the fact that Mr. Gill produced no medical evidence whatsoever on the night of the trial when he asked for and was refused a continuance, nor did Mr. Gill produce medical evidence of disability the following morning (or even ask for a continuance at this later time), preferring to take his chance of an acquittal with the jury. It was only months later, at the hearing of the Motion For a New Trial, that Mr. Gill called his physician, Dr. Ben Morrison, into court to give evidence about counsel's alleged ill health at the time of the trial. R. 337 et seq. If Mr. Gill had really been ill on the night of the trial, he could easily have contacted Dr. Morrison during the thirty-five minute recess

which preceded the putting on of the defense herein, and Dr. Morrison could have offered evidence on the condition of Mr. Gill's health to the court that very night, or the following morning before court reconvened at 9:30 a.m. Also, it should be noted that Mr. Gill's associate, Mr. Robert Link, was at all times present in court and ready to assist Mr. Gill during the trial, but was never called on for help by Mr. Gill, who conducted the defense himself. See R. 605-688.

In concluding argument on this third point the State of Louisiana respectfully contends to this Court that the accused herein suffered no prejudice from the ruling of the trial judge refusing to grant the defense more than a 35 minute recess after the prosecution had rested on the first day of the trial. That the accused were in no way prejudiced by this ruling is clear from the vigorous defense put on by Mr. Gill and Mr. Link on the night of March 21-22, when they called seventeen witnesses to the stand, from their vehement arguments to the jury the following morning (Mr. Gill's argument lasted about 1½ hours), and from the many bills of exception reserved by defense counsel during this period of the trial. In addition, the testimony of the jurors who took the stand at the hearing on the Motion For a New Trial showed positively that the jury in this case wanted to work late into the night and had so informed the judge, and that the jurors remained alert and interested in the proceedings throughout the trial.

## CONCLUSION

The State of Louisiana respectfully requests that this Honorable Court deny the Petition for Certiorari which has been filed in the above-captioned matter.

JACK P. F. GREMILLION,
Attorney General of the
State of Louisiana.

WILLIAM P. SCHULER,
Assistant Attorney General
State of Louisiana.

JIM GARRISON,
District Attorney
for the Parish of Orleans.

LOUISE KORNS,
Assistant District Attorney
for the Parish of Orleans.

## CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the Supreme Court of the United States, certify that a copy of the above and foregoing brief has been served on counsel for appellant by depositing same in the United States Mail, postage prepaid, addressed as follows:

G. W. Gill, Sr. Esq.
George M. Leppert, Esq.
1707 Pere Marquette Bldg.
New Orleans, La. 70112

Robert S. Link, Sr. Esq.
National Bank of
Commerce Bldg.
New Orleans, La.

New Orleans, Louisiana, this ..... day of May, 1968.

WILLIAM P. SCHULER

B-1379, 5-68

SUPREME COURT, U. S.

FILED
JUL 18 1968
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

**OCTOBER TERM, 1968.**

---

## No. 44

**(Formerly No. 1210, October Term, 1967.)**

---

**WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,**

**Petitioners,**

**versus**

**STATE OF LOUISIANA,**

**Respondent.**

---

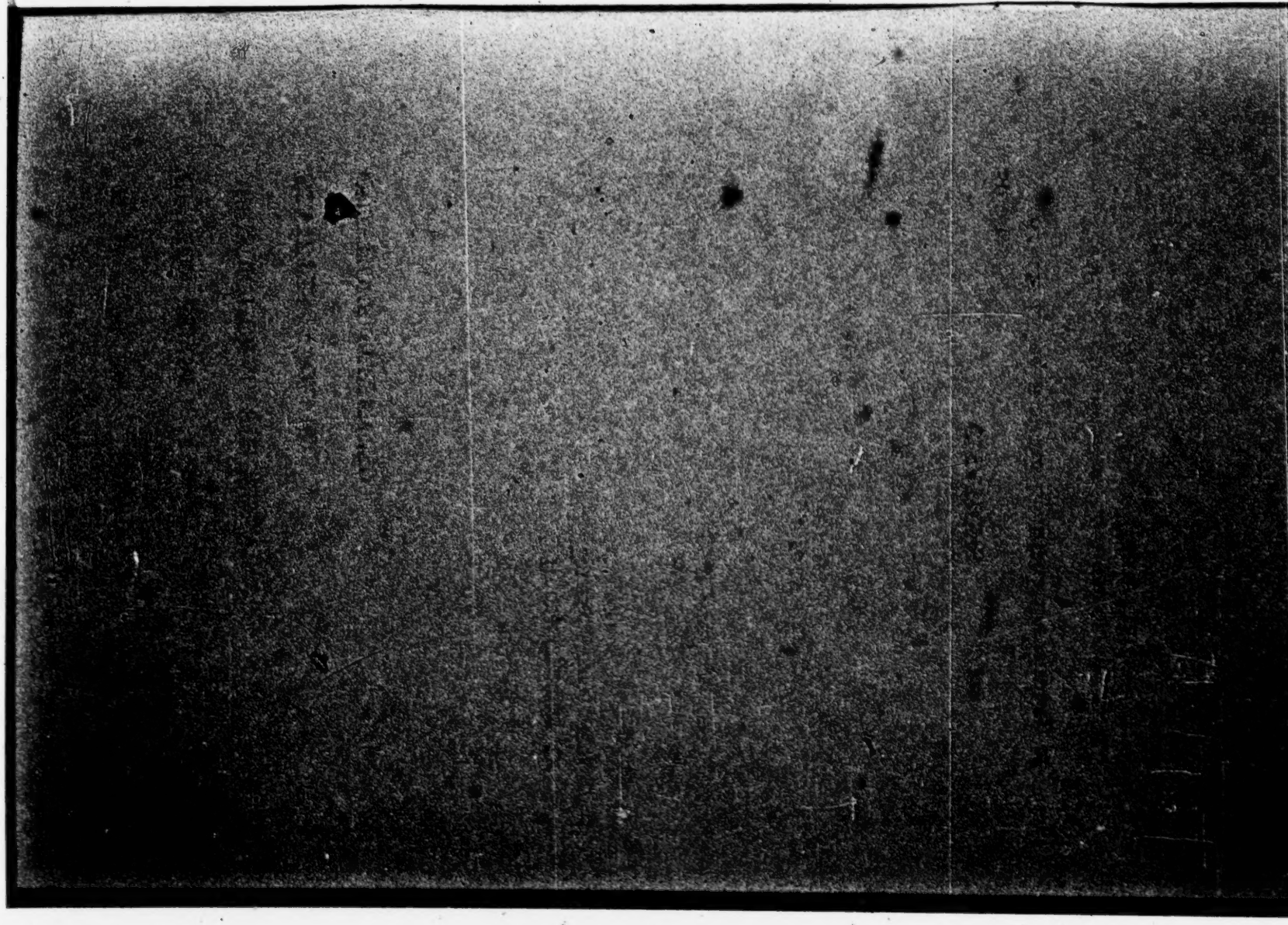
**On Certiorari to the Supreme Court of Louisiana To Review Proceedings of that Court in No. 48,445, "State of Louisiana vs. William Skinner, et al.".**

---

## ORIGINAL BRIEF ON BEHALF OF PETITIONERS.

---

G. WRAY GILL, SR.,
GEORGE M. LEPPERT,
1707 Pere Marquette Building,
ROBERT S. LINK, JR.,
National Bank of Commerce Building,
New Orleans, Louisiana,
Attorneys for Petitioners.



## INDEX.


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTIONAL STATEMENT | 2 |
| STATUTES INVOLVED | 2 |
| QUESTIONS PRESENTED | 3 |
| STATEMENT | 3 |
| SUMMARY OF ARGUMENT: | |
| (A) Absence And Lack Of Representation Of Defendant Charbonnet During Crucial Pre-Trial Hearing | 6 |
| (B) Prejudicial Effects Of All Night Session, Sleeping Jurors And Illness Of Trial Counsel | 17 |
| (C) The Defective Conspiracy Charge | 24 |
| CONCLUSION | 25 |
| CERTIFICATE OF SERVICE | 27 |


## CITATIONS.


| | |
|---|---|
| Statutes: | |
| Article I, Sec. 9 of the Louisiana Constitution of 1921 | 2, 14 |
| The Sixth and Fourteenth Amendments to the Constitution of the United States | 2 |

CITATIONS—(Continued):


| | Page |
|---|---|
| Cases: | |
| State v. Breedlove, 199 La. 965, 7 So.2d 221 | 13, 15 |
| State v. Pepper, 189 La. 795, 180 So. 640 | 13 |
| State v. Pope, 39 So.2d 719, 214 La. 1026 | 14 |
| State v. White, 153 So.2d 401 | 15 |
| State v. Layton, 180 La. 1029, 158 So. 375 | 15 |
| Federal Cases: | |
| Crowe v. United States, 200 F. 2d 526 | 16 |
| Evans v. United States, 284 F. 2d 393 | 16 |
| Jones v. United States, 299 F. 2d 661 | 16 |
| Glouser v. United States, 296 F. 2d 853 | 16 |
| Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 | 16 |
| Texts: | |
| 14 American Jurisprudence, Sec. 189 | 15 |
| 23 C.J.S., "Criminal Law", Sec. 973 | 16 |

**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1968.**

---

**No. 44.**
**(Formerly No. 1210, October Term, 1967.)**

---

**WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,**
**Petitioners,**

**versus**

**STATE OF LOUISIANA,**
**Respondent.**

---

**On Certiorari to the Supreme Court of Louisiana To Review Proceedings of that Court in No. 48,445, "State of Louisiana vs. William Skinner, et al.".**

---

# ORIGINAL BRIEF ON BEHALF OF PETITIONERS.

---

## OPINION BELOW.

The opinion below is reported in 204 So.2d 370. The Supreme Court of Louisiana had, on original hearing, reversed the conviction and sentence. On rehearing, the sentence and conviction were affirmed by a vote of 6 to 1. Both opinions are reported in 204 So. 2d, commencing at page 370. The final opinion was reproduced in Appendix A of the application for certiorari herein and the original opinion is reproduced in a Supplemental Appendix, filed under separate cover with this brief by orders of the Clerk of this Honorable Court.

## JURISDICTIONAL STATEMENT.

On rehearing before the State Supreme Court, the original reversal of the conviction and sentence was recalled and, by judgment entered November 6, 1967, the State Supreme Court affirmed the conviction and sentence of your petitioners. Application for a second rehearing was denied on December 11, 1967 and timely application for certiorari was made to this Court. Certiorari was granted by this Court on the 3rd day of June, 1968.

Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257 (3) and the rules of this Court.

## STATUTES INVOLVED.

The right to confrontation of an accused by witnesses against him is set forth in Article I, Sec. 9, of the Louisiana Constitution of 1921, in the following language:

> "The accused in every instance shall have the right to be confronted with the witnesses against him, etc."

The procedure sanctioned in the instant case is measured against the Federally guaranteed rights to confrontation and due process contained in the Sixth and Fourteenth Amendments to the Constitution of the United States.

## QUESTIONS PRESENTED.

1. Were the constitutional rights of petitioners to due process and confrontation by witnesses, guaranteed under both State and Federal Constitutions, violated by reason of the fact that, during hearing on certain vital pre-trial motions, one defendant was neither present nor represented by counsel?

2. Were the constitutional rights of defendant and petitioner Charbonnet violated by reason of the fact that he was arraigned, without counsel, in a felony case in which he was later to be sentenced to fifty years in the penitentiary?

3. Were the constitutional rights of all the petitioners to due process denied by reason of the all night session conducted, the illness of counsel and the fact that the jury was so exhausted that two of the jurors were apparently asleep during a critical phase of the case?

4. Were petitioners denied due process by reason of the defective charge relating to conspiracy?

## STATEMENT.

Although this application for certiorari is limited to the four questions above presented, in order to appreciate the full impact of the above errors, it is necessary to note at the outset:

(a) That your petitioner William Skinner was neither a user nor a "pusher" of narcotics, but a reputable and successful business man in New Orleans who operated two rather large second hand automobile sales outlets under the name of "Skinner's Automart." He became a target of the undercover narcotic agents *only after they had failed to put together a charge against one of his employees.* (Vol. 1, R. 52, 53.) As the record will clearly show, he was entrapped by State narcotics agents, acting under a "front" consisting of an auto finance agency which was vital to the operation of Skinner's automobile business. The vicious tactics employed to pressure Skinner into a purely technical "possession" of marijuana stand forth clearly, as noted below;

(b) That, as to petitioner Charbonnet, sentenced to fifty years in the penitentiary, the trial Judge created the novel theory that, because he had not filed or joined in certain preliminary motions, said motions could be tried and disposed of without even notifying him of said hearings. Thus, despite the fact that issues vital to him were being tried, this indigent negro was allowed to languish in jail, while his fate was being decided in the Courtroom.

Your petitioner Alton J. Charbonnet, a 33 year old negro, was charged jointly with petitioners Skinner and Gueldner in an information charging two counts relative to marijuana: sale and possession. At the time of trial there was also pending against all three

petitioners a charge of conspiracy relative to the same naroctics transaction but said case was not tried or in any way consolidated with the instant case. Nevertheless, as noted below, the trial judge evidently confused the instant case with the conspiracy case. This is indicated by the fact, as noted hereafter, that he referred to the instant case, during trial of a preliminary motion, as one involving conspiracy (Vol. 1, R. 64) and he finally gave a full blown charge on conspiracy, though none was charged.

Such confusion during the trial, and during handling of preliminary motions, is further indicated by the failure to have defendant (petitioner) Charbonnet even present in Court during the trial of certain motions vitally affecting his case.

Your petitioner William Skinner was a fairly prosperous dealer in second hand automobiles with two outlets for retail sales in New Orleans. Gueldner was his employee who assisted in sales and was generally active in the business. State undercover narcotic agents were first seeking to make a case against another employee, not here involved and, for that purpose, they infiltrated Skinner's automobile business by virtue of automobile loans which one agent controlled through a "front" as manager of a financing agency. (Vol. 2, R. 680.) It was admitted by the undercover agent that Skinner himself had not been a suspect but that the investigation had been initiated against one of his employees who was never charged. (Vol. 1, R. 52, 53.)

Using his leverage as manager of the finance company, vital to Skinner's business, this agent in disguise first began to probe his influence on Skinner by first getting the latter to loan or give him money for betting at the race track. (Vol. 2, R. 456.) Later, the same agent, probing still further the extent of his influence upon Skinner, persuaded the latter to obtain dates with women for him. Finally, having found Skinner willing and eager to please, the State contends that the agent got Skinner to put him into contact with Charbonnet for the purpose of obtaining some marijuana. (Vol. 2, R. 420.)

The information charged a single transaction on May 21, 1965.

## ARGUMENT.

### The Absence Of Defendant Charbonnet During Crucial Pre-Trial Motions, Lack Of Representation And Even Of Notice Of Said Evidentiary Hearings.

Bill of Exceptions No. 35 (Vol. 2, R. 388) relates to the denial of a motion for new trial because defendant Charbonnet, although a co-defendant, was neither present nor represented by counsel during the hearing of certain important preliminary motions vitally affecting his case.

The minute entries in this case reflect that on August 26, 1965 all three defendants were arraigned together and all pleaded not guilty. (Vol. 1, R. 1.) (The date "Aug. 26, 1966" here is an obvious clerical

error.) The same entry notes that defendants Skinner and Gueldner were given ten days in which to file technical pleadings and defendant Charbonnet was given the *same delay to determine counsel. Thus, he was not even represented by counsel at his initial arraignment.*

Charbonnet, an indigent negro, was at first unable to obtain counsel and an additional delay was granted. On Sept. 20, 1965 the Court appointed Mr. Monie as counsel for Charbonnet. (Vol. 1, R. 2.)

On Sept. 21, 1965, Mr. Gill, as counsel for Skinner and Gueldner filed a motion for bill of particulars, motion for preliminary examination, a motion to quash and a motion to quash the search warrant. (Vol. 1, R. 2.)

The case did not go to trial until the following year, on March 21, 1966. Meanwhile defendant Charbonnet was supposedly represented by a succession of Court appointed counsel, one of whom died. (Vol. 1, R. 4.) During this lengthy period in which Charbonnet was nominally represented by Court appointed counsel:

(a) He was never present at the trial of the many motions noted above, vitally affecting his case;

(b) The minutes fail to reflect that he was ever represented by counsel at the trial of these important motions; and

(c) He was never even notified of the trial of these motions, his counsel were never so notified and Charbonnet himself languished in jail during this period, being unable to make bail.

The motions for a bill of particulars, plea of entrapment and motion to quash were heard, evidence taken and disposed of on September 28, 1965. (Vol. 1, R. 3.)

On Oct. 8, 1965 the minutes reflect that the motion for preliminary hearing was disposed of (Vol. 1, R. 4) and it was in this connection that the Court, in holding that a prima facie case had been made out so as to *hold the three defendants for trial,* held that a case for conspiracy had been made, *despite the fact that conspiracy was not charged in the instant case.* Reference to a conspiracy, therefore, could only have related to a separate pending case. Significantly however, on this, as on the hearing of other motions noted above, the Court was making rulings which had a direct and vital bearing upon defendant Charbonnet, who was neither present nor represented during the extensive trial of such motions and who was not even notified that they were being held.

It was not until Jan. 18, 1966 that defendant was able to obtain employed counsel, Mr. Link. (Vol. 1, R. 5.) Said counsel immediately proceeded to request copies of the transcript of the proceedings in the many motions noted above and this request was granted. (Vol. 1, R. 5.)

The extensive testimony taken in connection with the above motions, including the preliminary examination and motion to suppress covered some 47 pages of testimony. (The transcript of this testimony, through clerical oversight, appears in reverse order. The testimony in connection with the Oct. 8, hearing commences at page 41 of Vol. 1 and that in connection with the Sept. 28 hearing commences at page 73 of the same volume.)

During the trial of two of these jointly heard motions, in which extensive testimony was heard, the trial Judge expressly noted the absence of defendant Charbonnet: (Vol. 1, R. 80)

BY THE COURT: "*** In the second count they are charged with—*three people are charged here*—Mr. Charbonnet, BUT HE'S NOT HERE BECAUSE HE NEVER ASKED FOR THIS HEARING—did wilfully *** etc." (Emphasis added.)

The failure of the Court to have defendant Charbonnet present at hearing of these vital motions, particularly during the preliminary hearing, was doubly prejudicial: First, it prejudiced the rights of defendants Skinner and Gueldner by depriving them of the benefit of having Charbonnet being present to hear what was being said by the State witnesses, particularly during the preliminary examination. Secondly, it prevented Charbonnet being on hand so as to hear what was being said against him at a time

when he or his counsel could do something about it, i.e., exploit any "breaks" in the case.

This highly unusual procedure of attempting to try "piecemeal" *a case tightly involving three defendants, leaving one out altogether,* was in direct violation of State constitutional safeguards, discussed below, and violative of the rights of all defendants to due process under the due process clause of the 14th Amendment to the Constitution of the United States.

The prejudicial effect of this "piecemeal" procedure, quo ad ALL DEFENDANTS is pointed up by the fact that, at one stage in the taking of testimony during said pre-trial hearings, THE STATE HAD PUT FORTH ERRONEOUS EVIDENCE AS TO THE IDENTITY OF THE UNDERCOVER AGENT INVOLVED IN A MOST VITAL PART OF THE CASE. AGENT HEBERT WAS CONFUSED WITH AGENT FULLINGTON. (Vol. 1, R. 6.) This error was committed before Mr. Link ever got into the case. Thus, when Mr. Link, as counsel for Charbonnet, later requested and obtained a copy of the transcript of the proceedings of the pre-trial motions to quash, for preliminary hearing, etc., it appeared that the State was on the verge of going to trial with a highly defective bundle of proof, one which could possibly be blown high when it developed that the State had the wrong agent identified in a major phase of its proof. In this context, therefore, it seemed highly inadvisable for Mr. Link to request that the pre-trial evidence be rehashed by a second hearing, because

this would be merely an invitation to allow the State to find out what its case was all about and to straighten out its proof in apple pie order. Thus, there was certainly no lack of diligence on the part of Charbonnet's employed counsel. In retrospect, what he did seems entirely proper. He must have realized that the transcript of the hearings revealed a major defect in the State's case, one which might be exploited at trial if uncorrected. Moreover, in view of the fact that, under Louisiana law the grant of a preliminary hearing, after indictment, is purely discretionary, there was little likelihood that the trial Judge would have granted him a preliminary hearing for Charbonnet virtually on the eve of trial. So, counsel for Charbonnet, Mr. Link, decided to sit tight and let the State try to make out the best it could with its mixed-up identity situation.

AT THIS POINT THE PLOT THICKENS: ABOUT A WEEK BEFORE TRIAL THE STATE DISCOVERED ITS ERROR AS TO THE CONFUSION BETWEEN AGENT HEBERT AND AGENT FULLINGTON AND AMENDED THE INFORMATION TO SHOW THE CORRECT NAMES. (Vol. 1, R. 6.) THE OTHER DEFENDANTS WERE THEN FACED WITH A LAST MINUTE CHANGE IN IMPORTANT FACETS OF THE STATE'S CASE. THIS, OF ITSELF, WAS BOUND TO BE SOMEWHAT PREJUDICIAL. BUT THE MAIN ASPECT OF PREJUDICE, *AFFECTING ALL DEFENDANTS,* WAS THE FACT THAT, WHEN THE TESTIMONY WAS GIVEN WHEREIN THE NAMES OF THE TWO

AGENTS WERE CONFUSED, CHARBONNET WAS NEITHER PRESENT NOR REPRESENTED. IT MAY WELL BE THAT, HAD HE BEEN PRESENT OR REPRESENTED THE ENTIRE DEFENSE MIGHT HAVE SO CAPITALIZED ON THIS GRIEVOUS ERROR THAT THE COURT WOULD HAVE DISMISSED THE CASE ON THE PRELIMINARY HEARING.

Under Louisiana law, the main purpose of a preliminary hearing is to determine whether or not there is sufficient evidence to hold a defendant for trial. It might well have developed, therefore, that, with such major confusion in the wind, the trial Judge would have directed the State to back out and come back into Court with a decently prepared package of proof. As noted elsewhere, there was pending another separate case against all three defendants, one involving conspiracy. In fact, as noted in another connection, the Court himself confused the conspiracy case with the case at bar when he gave his charge to the jury. The giving of this full blown conspiracy charge, when no conspiracy was charged, was the sole basis of the initial reversal by the State Supreme Court.

It is, perhaps idle to speculate what might have happened had the trial Judge required this case to be tried in conventional manner, rather than in the "fractional" sort of hearing permitted here, one in which the indigent Charbonnet was kept locked up and uninformed as to what was going on until the last

minute. The simple fact is that this "piecemeal" procedure, in which Charbonnet was prevented from taking part in proceedings vitally affecting him, is simply monstrous. It is a worse sample of a Star Chamber proceeding than ever saw the light of day when Henry the Eighth trod the boards and Good Queen Elizabeth played footsie with Essex, et al.

The rationale of the State Supreme Court in giving its blessing to this bizarre procedure is contained in one paragraph, which is reproduced at page 57 of the Appendix with our petition for certiorari. Because this treatment presents a mystery as deep as the disappearance of Justice Crater, we repeat it here. In disposing of this most serious issue the following is all that the Supreme Court of Louisiana had to say:

"It is true that the minutes of court must show that the accused was present at every important stage of the trial for a felony from the moment of his arraignment to his sentence, *State v. Pepper,* 189 La. 795, 180 So. 640; *State v. Breedlove,* 199 La. 965, 7 So.2d 221, but, as stated *supra,* defendant Charbonnet pleaded "Not Guilty," and was thereafter represented by counsel. His counsel did not file a Motion to Suppress. Under such circumstances, we conclude that it was not imperative that he be present at the trial of the Motion to Suppress and Dismiss filed by defendants Skinner and Gueldner. Charbonnet suffered neither prejudice nor violation of his constitutional rights."

The statement by the State Supreme Court that, after pleading not guilty, Charbonnet, was "thereafter represented by counsel" is simply a batch of weasel words which scurry away from the simple truth that none of Charbonnet's numerous counsel lifted a finger to help him until Mr. Link got into the case. *This was even admitted by the State in its brief.*

In brushing aside these grievous procedural irregularities as to complete lack of representation and absence from vital portions of the trial, the State Supreme Court makes no attempt to reconcile what was done here with either State or Federal jurisprudence or constitutional safeguards.

The basic right to confrontation, provided by Article 1, Sec. 9, of the Constitution of Louisiana, is not even mentoned. Nor does the Court deign to discuss its own leading case of *State v. Pope,* 39 So.2d 719, 214 La. 1026 (1949) wherein the Supreme Court of Louisiana, with Justice Hamiter as organ (the lone dissenter here) declared:

"The jurisprudence of this state is to the effect that one tried for a felony must be personally present in court *at every important stage of the trial from the moment of the arraignment to his sentence, otherwise a verdict against him will be set aside.* (Emphasis added—Citing numerous Louisiana cases.)

The above statement of the rule, likewise under different facts, was approved by said Court as recent-

ly as 1963 in *State v. White,* 153 So. 2d 401, 244 La. 585. (see page 408, col. 2 of 153 So. 2d.)

*State v. Breedlove*, 7 So. 2d 221, 199 La. 965 (1942) is persuasive here. In that case the defendant had been absent (though represented by counsel) *at a hearing on a motion to quash the indictment.* The Supreme Court avoided a reversal there on the ground that the defendant had *not yet been arraigned* at the time the motion to quash was heard. The Court conceded the correctness of the rule stated as follows in *State v. Layton,* 180 La. 1029, 158 So. 375:

"The jurisprudence of this state is settled to the effect that one who is tried for a felony must be personally present in court *at every important stage of the trial from the moment of his arraignment to his sentence.*" (Emphasis added.)

The clear implication of *Breedlove, supra,* is that *after arraignment* a defendant must be present on the hearing of such a preliminary motion, a motion to quash where evidence is taken.

The general rule prevailing throughout the country is thus stated in 14 American Jurisprudence, Sec. 189, page 898:

"A principal that prevades the entire law of criminal procedure is that *after an indictment is found, nothing shall be done except in the presence of the prisoner or his counsel, except in certain cases of*

*misdemeanors.*" (Citing several cases. Emphasis added.)

Continuing in Sec. 190, page 899, same volume, the authors state:

"In capital cases, *and in fact in all charges of felony,* whether the defendant is in custody or on bail, *after indictment returned or information filed NOTHING MAY BE DONE by the court in the case* unless the accused is personally present. In a capital case, the rule holds good even after the accused has pleaded guilty . . ." (Emphasis added.)

The Federal requirement of the presence of the defendant at every stage of the case after indictment is well known and should require little documentation in this Court. See: *Evans v. United States,* 284 F. 2d 393, 94 ALR 2d 266; *Jones v. United States,* 299 F. 2d 661, cert. denied 371 U.S. 864, 83 S.Ct. 123, 9 L.Ed. 2d 101; *Crowe v. United States* 200 F.2d 526; *Glouser v. United States,* 296 F.2d 853, citing 23 CJS, Crim. Law, Sec. 973, cert. den. 82 S.Ct. 840, 369 U.S. 825, 7 L.Ed.2d 789.

Finally, *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965) settled the issue that right to counsel and right to be present at all phases of trial, guaranteed by the Sixth Amendment to the Federal Constitution, are rights which are binding upon the States and that denial of such rights is a denial of due process under the Fourteenth Amendment.

In view of all of the above, therefore this record fairly shouts the fact that these defendants did not receive anything resembling due process, they were simply "processed".

## LONG HOURS, SLEEPING JURORS AND ILL AND EXHAUSTED COUNSEL.

Mr. Gill, counsel for defendants Skinner and Gueldner, was suffering from a severe case of diabetes and other ailments later described by his personal physician as making it physically impossible for him to work all night in trial. (Vol. 2, R. 338.)

Trial of the case had commenced at 10:30 a.m. and continued on, with the usual recesses until the State rested near midnight. Thereupon the following occurred: (Vol. 3, R. 604)

BY MR. DOLAN: The State at this time will rest its case, reserving the right to rebuttal.

BY MR. GILL: *Before asking for a recess.* I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If Your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.

BY THE COURT: YOU HAVE BEEN AFTER ME ALL DAY, MR. GILL. I've gotten tired of listening to you. I am going to see if we can't finish this case

tonight. Go to work and see if we can't finish this case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'M SURE EVERYONE IS TIRED, ETC.

Thereupon, after a brief exchange Mr. Gill informed the Court that he was suffering from a "severe case of diabetes" (R. 605) which was later amply borne out by medical testimony of his personal physician, Dr. Morrison, on hearing of the motion for new trial.

Thereupon the Court replied "I know you have been ill" and added that "we have been having continuances on top of continuances" but generously allowed this 65 year old, weary diabetic a *THREE MINUTE RECESS.* (R. 605.)

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please I respectfully request Your Honor declare a mistrial.

BY THE COURT: Request for mistrial is denied.

BY MR. GILL: Respectfully object and reserve a bill of exceptions.

BY THE COURT: You may have your bill.

BY MR. GILL: Respectfully request a recess.

BY THE COURT: The Court will be at recess for *three minutes.*

After denying the request for a recess the first night *and the motion for a mistrial made upon such denial* (R. 605) the Court then kept the Court going till about *THREE O'CLOCK THE NEXT MORNING.* (R. 687.)

The jury was then ordered back for 9:30 a.m. that same morning at which time they heard arguments, received instructions and retired at 2:45 p.m.

On a motion for new trial, the excessively long hours were complained of and it was alleged that as a result: (a) Some of the jurors were asleep and (b) Due to his diabetic condition Mr. Gill was physically and mentally unable to perform in such round the clock fashion and still do justice to his clients.

Extensive evidence was heard on this motion (R. 255) including the testimony of the jurors, bystanders who saw two of them either sleeping or apparently asleep during trial and Mr. Gill's personal physican, Dr. Morrison who gave a detailed history of Mr. Gill's medical history during recent years, showing conclusively that, due to his diabetic condition and other ailments, it was physically impossible for him to perform as a trial counsel until 3 a.m. with any degree of mental alertness whatever. He also described the

resultant effects of this ordeal upon his patient after the trial, and how he was hospitalized and treated for weeks thereafter.

Mr. Gill also took the stand, testified to his physical condition when he first moved for a mistrial, and testified also to the fact that, the following day, during his own argument to the jury, he noticed one of the jurors nodding and apparently asleep. (R. 322 and 323.) He admitted that he probably should have moved for a mistrial then or called the Court's attention to the sleeping juror but he was in such poor physical condition that his judgment was not good and he did nothing. (R. 323.)

During the hearing of this motion the trial Judge argued with Mr. Gill as to whether or not any juror had been roused from sleep by a court attache, the Judge insisting that no such thing happened. (R. 323, 324.) However, after several witnesses testified that at least two of the negro jurors were either asleep or apparently sleeping, THE TRIAL JUDGE'S OWN CRIER, MR. MARCHESE, TESTIFIED THAT HE HAD DEFINITELY NOTED ONE NEGRO JUROR HAD HIS EYES CLOSED. (R. 349, 350.)

Mr. Gill's personal physician, Dr. Morrison, gave a detailed medical history of his patient and made perfectly clear that the ordeal of being made to try a case all day, straight through until 3 a.m. and then being made to return at 9:30 a.m. the same morning to continue trying a case made it impossible for Mr.

Gill to maintain any degree of efficiency whatever in his condition. Dr. Morrison stated that, after working beyond a twelve hour period his efficiency would be "almost nil". (Vol. 2, R. 338.) Dr. Morrison was intimately acquainted with Mr. Gill's physical history, having treated him for many years. He stated that his patient had been suffering from diabetes since 1951 or 1952. (Vol. 2, R. 339.) At the time of trial he had been suffering from an acidotic condition due to diabetes together with nervous exhaustion which had commenced about March 15, 1966 (six days before trial) and that when he examined Mr. Gill shortly after trial on March 26 he was complaining of feeling very fatigued and having pain over the region of the heart. He seemed to have a bloated appearance and had a blood sugar content which was abnormally high—about 240 as against a normal range of between 80 to 130. (Vol. 2, R. 338, 9.) Due to a shortage of beds in the hospital he couldn't hospitalize him immediately, despite efforts to do so at both Baptist Hospital and Touro. He treated Mr. Gill until March 31, when he finally got him into a hospital and he stayed in the hospital until April 12, stating: "It took that amount of time to get his diabetes under control", and he continued home treatment for the diabetes and other ailments discovered during the hospitalization period. (R. 339, 340.)

The State has previously responded to this objection to the all night session by suggesting below to the State Supreme Court:

(a) That Mr. Gill should have had a "standby" associate to help carry on the trial if he himself should become exhausted; and

(b) That Mr. Gill could not have been as exhausted as he claimed because, even after the all night session he was still able to make repeated objections and argue the case to the drowsy jury.

To the first suggestion, as to the necessity of having a "standby" associate, the short simple answer to this is that there was no reason to anticipate the necessity of such help. There was simply no reason why anyone should even consider in advance the possibility that the Court would choose to work virtually around the clock in a routine criminal case.

As to the second argument, we submit that the State's suggestion is patently ridiculous. Mr. Gill is a grizzled warrior of many battles. As long as he draws breath it is highly likely that he will continue expending it in noting an objection or reserving a bill. To many familiar with his prowess at the criminal bar in the by-ways and bayous of Louisiana, the better opinion would be that, when Brother Gill is being transported on his last journey to make his appearance before the Court of TRULY LAST RESORT, close listeners will doubtless be able to hear a thumping and a murmuring from within the coffin indicative that contained counsel still has something else to say.

And so it is ridiculous that urge that, simply because Mr. Gill was still able to get onto his feet and speak, that he was in any condition, physical or mental, to do justice to his clients. To the contrary, there is internal evidence that he was definitely "not himself" because:

(a) He overlooked calling a principal defense witness who would have testified that the car in which the marijuana was found did not belong to Mr. Skinner. (See details in application for second rehearing before State Supreme Court, Supplemental Appendix); and

(b) On the second day, after working all night, Mr. Gill was obviously wandering a bit when he *began to testify in his argument to the jury* and the Court stopped him over the State's objection. (Bill of Exception 28, Vol. 2, R. 247 through 251.)

In an earlier brief the State has also sought to suggest that the determination of the Court to work through the night was due to the fact that numerous continuances had been sought before. This is false for at least two reasons:

(a) First of all, we are not dealing here with another request for a *continuance*, but merely the problem of a normal recess and normal working hours; and

(b) Such continuances as had been granted were by no means unreasonable and were unopposed by the

State. Indeed, one such continuance was mandatory because the state, virtually on the eve of trial had amended the bill of information to show a different narcotics agent. When this was done a slight delay had to be granted.

Finally, as we have noted in earlier briefs to the State Supreme Court, the long hours of work with no rest took their toll not only of counsel and the drowsy jurors but of the able Court as well. As we have noted in great detail below the able trial Judge, an experienced criminal lawyer in his earlier days, made some mistakes which he would never have made had he been fresh, alert and at his shining judicial best. For example, he became confused and gave a charge on the full law of conspiracy although no conspiracy was charged in this case. There was a conspiracy charged in a separate proceeding, but not in the case at bar. It was this error which formed the basis of the reversal by the State Supreme Court on the original hearing. (See Supplemental Appendix.)

Moreover, as we have also noted in earlier briefs, he made several clear cut errors on his evidentiary rulings, in one of which he got hold of the wrong end of the best evidence rule and came up with a "reverse English" result.

## THE CONSPIRACY CHARGE.

The State Supreme Court, in its original hearing below, reversed the conviction by a vote of 6-1, solely

on the grounds that the conspiracy charge was erroneous here. This point is fully developed by the original opinion of the State Supreme Court herein and we rely upon same, along with Justice Hamiter who still adheres to it. For the sake of emphasis, however, and because we believe that the first two points developed above are of greater national interest, we will not elaborate upon the original State Court opinion.

## CONCLUSION.

There are many errors complained of below but we feel that the first two developed herein are most appropriate to our petition for relief at the hands of our highest Court. Certainly, when this Court is and has been struggling so valiantly to demand some reasonable facsimile of due process in State Courts, what we ask here is a basic minimum. What we ask is simply that:

(a) When there are three defendants jointly charged in a serious criminal offense, the State should not be permitted to try part of the case, in vital pretrial evidentiary hearings, without notifying one defendant or his counsel as to what is going on, particularly while that defendant is helpless in jail; and

(b) No matter how fashionable fast moving dockets may be these days, common sense demands a recognition that justice is administered by men and not machines and some consideration must be made

for human weariness, caused by ridiculous all night sessions provoked by a Judge who simply wanted to keep his docket moving at assembly line pace. This trial was a travesty of justice, for more reasons than one. Many other errors, strenuously presented below in a series of five briefs to the State Supreme Court, cannot for obvious reasons, be covered here. The net result was a mockery of justice and the bitter joke is upon this indigent Charbonnet who got fifty years without even having a chance to hear all of what was going on. In sum, the casual reader might plausibly conclude: "If this is due process, I'll take Russian Roulette."

For all of the foregoing reason, we respectfully submit that the judgment below should be reversed as to all defendants and a new trial order.

Respectfully submitted,

G. W. GILL, SR.,

GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,
Phone: 524-0147,

ROBERT L. LINK, JR.,
National Bank of Commerce Bldg.,
New Orleans, La.,
Attorneys for Petitioners.

## CERTIFICATE OF SERVICE.

I, G. Wray Gill, of counsel for petitioners and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing brief for petitioners has been served upon opposite counsel, the Attorney General of Louisiana and the District Attorney for the Parish of Orleans, by mailing same, postage prepaid and properly addressed to their respective offices on July ..., 1968.

G. WRAY GILL.

SUPREME COURT, U. S.
AUG 3 1968
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1968.

---

## No. 44

(Formerly No. 1210, October Term, 1967.)

---

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

---

On Certiorari to the Supreme Court of Louisiana To Review Proceedings of that Court in No. 48,445, "State of Louisiana vs. William Skinner, et al.".

---

## SUPPLEMENTAL APPENDIX.

---

G. WRAY GILL, SR.,
GEORGE M. LEPPERT,
1707 Pere Marquette Building,
ROBERT E. LINK, JR.,
National Bank of Commerce Building,
New Orleans, Louisiana,
Attorneys for Petitioners.

# INDEX TO SUPPLEMENTAL APPENDIX.


| | Page |
|---|---|
| ORIGINAL OPINION—STATE SUPREME COURT | 1 |
| ORDER GRANTING REHEARING FROM ORIGINAL OPINION | 25 |

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1968.**

---

**No. 44.**

**(Formerly No. 1210, October Term, 1967.)**

---

**WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,**

**Petitioners,**

**versus**

**STATE OF LOUISIANA,**

**Respondent.**

---

**On Certiorari to the Supreme Court of Louisiana To Review Proceedings of that Court in No. 48,445, "State of Louisiana vs. William Skinner, et al.".**

---

## SUPPLEMENTAL APPENDIX.

---

### ORIGINAL OPINION—STATE SUPREME COURT.

HAMITER, Justice.

William Skinner, August R. Gueldner and Alton J. Charbonnet were jointly charged in a bill of information, in two counts, with the illegal possession and sale of a narcotic drug (marijuana) on May 21, 1965. Following a trial before a jury of twelve they were found guilty as charged on both counts. Thereafter, each was sentenced to a lengthy term at hard labor in the state penitentiary.

Thirty-five bills of exceptions reserved during the course of the proceedings were perfected. However, in this court defendants rely on only fifteen of them, some of which involve the same issues.

One of the bills principally relied on, and which we think is meritorious, is that taken to the overruling of defendants' objection to the trial judge's general charge to the jury. It is numbered 29.

The charge contained, as the state concedes, a full statement relative to the law of conspiracy. With reference to this subject the judge observed:

"CONSPIRACY

"I charge you, gentlemen of the Jury, that a criminal conspiracy is defined to be a combination or agreement between two or more persons to do a criminal or unlawful act, or to do a lawful act by criminal or unlawful means. It has been said that a criminal conspiracy is a partnership in criminal purposes.

"The term conspiracy imports an agreement, but the agreement need not be a formal one. It is not necessary, to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words, or in writing, state what the unlawful scheme is to be, and the details of the plan, or means, by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or

through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design.

"Conspiracies to commit crime can be established as well by circumstantial evidence as by direct evidence.

"The weight and sufficiency of the evidence to prove a criminal conspiracy is a matter for the jury, and so is the existence of the conspiracy.

"A conspiracy may, and generally must, be proved by circumstantial evidence, and if the circumstances tend to prove it, it is for the jury to determine whether they are consistent with the reasonable hypotheses of innocence. It is not necessary to sustain proof of a conspiracy to show that the parties made and actually agreed jointly to undertake the perpetration of a criminal act; that fact may be proved by circumstantial evidence sufficient to satisfy the jury of its existence.

"*No person can be held guilty unless the act is either actually or constructively his;* and it cannot be his, in either sense, unless committed by his own hand or by someone acting in concert with him, or in furtherance of a common object or purpose, as distinguished from someone acting independently or in opposition to him.

"The rule for criminal responsibility for acts of others done in prosecution of an unlawful object is subject to the limitation that the particular act of one of a party, for which the associates and confed-

erates are to be held liable, must have been shown to have been done for the furtherance, or in the prosecution of, the common object and design for which they are combined together. There can be no criminal responsibility on the part of a conspirator resulting from something not fairly within the common enterprise.

"*When two or more persons enter upon a common enterprise or adventure which contemplates the commission of a criminal offense, each is a conspirator, and his criminal responsibility extends not alone to the enterprise, adventure or encounter in which the conspirators are engaged but takes in the proximate natural and logical consequences of such adventure.*

"*When a conspiracy is entered into to do an unlawful act, all persons engaged therein are responsible for all that is done in pursuance thereof by any of their conspirators, until the object for which the conspiracy was entered into is fully accomplished.*

"*This responsibility is not confined to the accomplishment of the common design for which the conspiracy was entered into, but it extends to, and includes, collateral acts and incidental and growing out of the common design.*

"It is for you to determine, gentlemen, as a matter of fact, from all of the evidence submitted to you, whether or not a conspiracy has been established,

beyond a reasonable doubt, and that the defendants on trial were engaged in the said conspiracy.

"Unless you are satisfied that a conspiracy has been established I charge you that the acts and declarations of one of the parties to the alleged conspiracy do not bind the other." (Italics ours.)

In his per curiam to bill No. 29 the judge, in justifying his observations, notes only that "The defendants did not point out wherein the above charges given to the jury was not the law and the Court is at a loss to understand why the defendants objected thereto."

However, such bill, which contains the pertinent portion of the transcript, shows that following the charge defense counsel objected thusly: "I respectfully object to Your Honor's charge on conspiracy, *both as to its tenor and applicability in this case.*"

This language was clearly sufficient to put the court on notice that the objection was made to the relevancy of the charge on conspiracy, the defendants having been accused of committing specific illegal acts and not with *a conspiracy* to commit them.

In State v. Gunter et al., 208 La. 694, 23 So.2d 305, one of the three accused charged jointly with simple kidnapping had pleaded guilty and was a witness for the state. On the trial of the others, one had requested special charges on the law of conspiracy which recited: " 'I charge you, gentlemen of the jury, that mere cognizance of fraudulent or illegal action does

not constitute a conspiracy, but there must be shown active participation by the parties charged.

"'**********

"'That when the common enterprise is abandoned by one of the conspirators, that no other conspirator by his acts or actions is permitted to affect the others.

"'That in order for the acts and declarations of a conspirator to be admissible against a co-conspirator, the State must prove that the conspiracy is formed or existed and that the accused against whom it is sought to employ such evidence was connected with such conspiracy and crime charged.

"'That the admissibility of the acts and declarations of the co-conspirators against other members of the conspiracy is limited to those acts and declarations which are pursuant to and in furtherance of the unlawful combination or crime charged.'"

The trial judge refused to so charge. And on appeal to this court, following conviction, we observed: "Under Article 26 of the Criminal Code, conspiracy is a separate and distinct offense from the completed crime. So much is this the case that a conviction for conspiracy will not bar a conviction for the completed crime and vice versa.

"As stated by the judge in his per curiam, under Article 24 of the Criminal Code, all persons concerned in the commission of a crime are regarded as

principals. The defendants in this case were jointly charged with the offense of simple kidnapping under Article 45 of the Criminal Code. They were charged as principals and not as conspirators. * * *

"The judge gave his charge to the jury in writing, but he did not give to the jury the special charges requested by the defendant. The judge assigns as his reason for refusing to give the special charges that they were covered in part by his general charge *and were otherwise not applicable to the facts in the case. His ruling was correct. Since the defendants were not charged and prosecuted for conspiring to commit the offense of simple kidnapping, but were charged and prosecuted for the basic offense of simple kidnapping, the instructions requested by defendant relative to conspiracy were not applicable to the case.* * *" (Italics ours.)

Also pertinent here is State v. Fletcher, 236 La. 40, 106 So.2d 709 in which we said: "The request to include a statement concerning the law of conspiracy in the general charge *was likewise properly denied as being irrelevant. Appellant was charged with the substantive offense of possessing narcotics and not with the separate and distinct crime of a conspiracy to possess them, which is composed of different elements.*" (Italics ours.)

In its original brief, and in several supplemental briefs filed following oral argument of the case, the state has cited (in support of its contention that the

detailed charge on the substantive law of conspiracy was proper) the following cases: State v. Gebbia et al., 121 La. 1083, 47 So. 32, State v. Brasseaux, 163 La. 686, 112 So. 650, State v. Robichaux, 165 La. 497, 115 So. 728, State v. Taylor, 173 La. 1010, 139 So. 463, State v. Terrell, 175 La. 758, 144 So. 488, State v. Gunter, 180 La. 145, 156 So. 203, and State v. Melerine, 236 La. 929, 109 So.2d. 471.

We note initially that all of these decisions except State v. Melerine, supra, were rendered prior to the last Gunter and the Fletcher cases heretofore discussed, the latter two being the latest expressions of this court specifically on the subject.

Moreover, all of the decisions cited by the state, except the Terrell and Taylor cases, supra, related only to the admissibility and probative effect of hearsay evidence as between co-defendants. In each the defendants objected to the court's admitting testimony of conversations (which tended to connect them with the crime charged) between third persons and a co-accused. The basis of the objection was that the prejudicial evidence was hearsay as to the defendants who were not present when the conversations occurred. We held that such conversations (which ordinarily would be objectionable under the hearsay rule) were admissible and could be considered against all defendants if it be proved by the state that a conspiracy existed to commit the crime with which the defendants were jointly charged (or as against such of them as were shown to have been involved in the conspiracy).

In most of the opinions we noted that the trial judge cautioned the jurors that the admitted evidence could be considered as to all of the defendants only if they found that the statements were made during the existence of a conspiracy. But in none does it appear that a full statement of the substantive law of conspiracy was included in the general charge, such as occurred herein. (In the Robichaux case the statements were limited to the defendant present, because they were made after the crime had been committed and hence after the termination of the conspiracy. In the Gebbia opinion we noted that the district judge in his general charge had made a short statement, which we quoted, concerning the law of conspiracy. However, we did not pass on the propriety of his doing so nor on the correctness of his remarks, we observing that no bill of exceptions was reserved to the charge or the court's refusal to charge.)

In State v. Taylor, supra, four defendants were accused of murder, the charge against three of them being founded on the murder-felony doctrine. The alleged murder occurred *after* (not during) the commission of the felony (an armed robbery), at a time when the participants in the robbery had separated and while the defendant who actually did the killing was some distance from the scene of the felony attempting to make good his escape therefrom. A careful reading of the charge given by the trial judge discloses that it was really not a dissertation on the general law of conspiracy, and that it was not objected to as such. Rather, it was an instruction on the

felony-murder doctrine as it applied to the particular facts of that case—to what extent each participant in the felony was responsible for a killing occurring as a result of the commission of a felony and as to how long the responsibility endured. We discussed only the questions of whether the law as stated in the general charge was correct or whether the law was as stated in special charges requested by the defendants.

As our opinion in the Taylor case reflects, since the killing involved therein occurred *after* the completion of the robbery, and away from its scene, the legal responsibility of the robbery participants for such killing depended on their being parties to a conspiracy to commit the robbery, the commission of the robbery by them, and the fact that the conspiracy agreement contemplated that it would endure until the booty therefrom had been distributed. And the state was required to prove these facts in order to establish their guilt of the crime charged. Consequently, the court's charge was not merely an abstract proposition of the law of conspiracy. To the contrary, it constituted an instruction on the essential elements of the crime of murder under the murder-felony doctrine (under which three of the defendants were being tried) as applicable to the facts of that particular case.

Furthermore, our opinion in such case makes it clear that the contention of the defendants was not that any charge involving conspiracy was inapplica-

ble, but that the substance of the charge was erroneous. Indeed, the defendants had prepared and submitted lengthy special instructions on the entire subject matter (which are quoted in the opinion) to the effect that under such circumstances no guilt would attach to the participants, or co-conspirators, if the killing occurred out of their presence *after the completion of the robbery* and away from the scene thereof. In fact, the issues were presented to us (not on an objection to the judge's charge) in a bill taken to the court's refusal to give the special charges requested by defendants.

State v. Terrell, supra, presented an issue similar to that considered in State v. Taylor, supra. Some of the defendants had been tried for murder under the felony-murder doctrine, the killing having occurred *after* the completion of the initial illegal act (armed robbery) and not in the presence of all of the defendants. The judge gave the almost identical charge as was given in the Taylor case. (The author of the opinion refers the reader to the latter case for a full text of the charge.) Reference to the briefs in that case show that, as in the Taylor matter, the complaint of the defendants was that the charge was not substantively correct. Far from urging that no charge involving conspiracy could be given, one of the defendants, Mose Conner, urged that "The charge on the law of conspiracy was *insufficient* * * *." Also, it appears that all defendants themselves requested their own charges on conspiracy.

In any event in the Terrell case, similarly as in the Taylor prosecution, the occurrence and extent of the conspiracy to commit the robbery were essential substantive elements of the murder accusation as it related to those not present when the killing occurred and, hence, required explanation to the jury. In both cases the instructions appeared in that portion of the general charge dealing with who were "PRINCIPALS", and not (as here) as a separate instruction on "CONSPIRACY."

The Taylor and Terrell cases, therefore, are clearly distinguishable from the instant matter wherein proof of an agreement, or conspiracy, to possess or sell narcotics was not an essential, substantive, element of the crime, it being necessary only that the state show that each *aided or abetted* in the commission of the said illegal acts (LRS 14:24), albeit proof of a conspiracy could be shown during the trial in order to render admissible as to more than one defendant evidence connecting them with the particular crime charged, which proof might otherwise be inadmissible under the hearsay rule.

The state herein, in a supplemental brief, has also cited LRS 5:455 in support of the propriety of the judge's charge on conspiracy. But that article in no way affects the substantive law. Its purpose and intent is solely to provide for *regulating the effect of evidence* as between co-conspirators during the existence of the conspiracy. The article in no manner affects their guilt or innocence, and it does not require

proof of a conspiracy for conviction of the illegal acts charged. State v. Rodosta, 173 La. 623, 138 So. 124 and State v. Clement, 194 La. 395, 193 So. 685. Therefore, when such evidence is admitted over the objection of one or more defendants that it is hearsay as to them, the judge, under the provisions of this article, may then caution the jury as to its effect among the accused. But the article clearly does not warrant a separate and independent instruction in the general charge on the entire substantive law of conspiracy, such as was given herein.

We conclude, therefore, that the conspiracy portion of the charge complained of in bill No. 29 constituted an abstract, inapplicable discourse on the law on that subject and was improper.

We further conclude that such charge was prejudicial to these defendants. (Incidentally, nowhere in any of the state's several briefs is it argued that the charge was not prejudicial.)

As stated in "Underhill's Criminal Evidence, 4th Edition, page 310, Section 180, "The large majority of persons of average intelligence are untrained in logical methods of thinking, and are therefore prone to draw illogical and incorrect inferences, and conclusions without adequate foundation. From such persons jurors are selected.* * *" Because the jury is made up of lay persons, uninformed as to legal distinctions, we think that a detailed substantive statement as to the law of conspiracy might easily

have led to believe that they could properly return a verdict of "guilty as charged" if they found only that a conspiracy existed among the defendants. (Particularly is this true in view of the court's admonition that "it is for you to determine, gentlemen, as a matter of fact, from all of the evidence submitted to you, whether or not a conspiracy has been established, * * * and that the defendants on trial were engaged in the said conspiracy.")

In this connection we note that the state's chief witness, an undercover agent named Fullington, had testified that he had made the contact to obtain the drug through Skinner at about 11:00 o'clock of the morning of May 21, 1965 (the date of the crime charged), at Skinner's Motor Mart; and that the sale and delivery was consummated that night with Charbonnet. Also, the court permitted the state to introduce evidence of the commission of similar offenses *at a later date* to show system and intent as to all defendants, which evidence consisted of conversations and acts not carried on in the presence of all defendants and occurring after the commission of the crime charged—that is, as shown by the per curiam, after the conspiracy proved by the state had ended. (The evidence was allowed, although as to at least one of those occasions two of the defendants objected because it was out of their presence. See bill of exceptions No. 19.)

The record reflects serious discrepancies between important portions of Fullington's testimony given

during the trial and at a previous preliminary hearing. Moreover, a disinterested witness for the defense testified positively (contrary to Fullington's testimony) that, in connection with the purchase and acceptance of an automobile from Skinner, she was on Skinner's Motor Mart lot and in his office from 9:00 in the morning of May 21, 1965 (the date of the crime charged) until 2:30 that afternoon and that only Gueldner was there in the morning—that Skinner did not come until 1:00 p.m. o'clock—and that Fullington was not there at all while she was present.

In view of this serious conflict in the testimony, as well as the discrepancies in Fullington's statements, it is quite probable that the jurors could not find without a doubt that the crime charged in the bill of information actually occurred; but that they did believe from all of the evidence, including the proof of the later offenses, that the defendants were at least involved in a conspiracy; and hence that they (the jurors) returned their mentioned verdict, being under the impression (because of the judge's erroneous admonition) that they could find the defendants guilty as charged if they concluded only that such a conspiracy existed.

It is, of course, impossible to discover and state exactly what prompted the verdict. But when such a strong likelihood exists that the jury's decision might well have been influenced by improper procedure, as here, we must hold that the error complained of in bill No. 29 was prejudicial to the defendants.

Because of this holding we deem it unnecessary to consider the other bills of exceptions. The errors complained of in them will not likely occur in retrial of the case.

For the reasons assigned the convictions and sentences are annulled and set aside, and the case is remanded for a new trial.

SANDERS, Justice (dissenting).

The Court has reversed because the trial judge gave the jury an instruction as to conspiracy in a trial of three defendants for the illegal possession and sale of a narcotic drug. I dissent.

It is well settled that when multiple defendants are charged with a substantive offense, evidence is admissible at the trial of a conspiracy to commit the crime charged. State v. Robichaux, 165 La. 497, 115 So. 728; State v. Gebbia, 121 La. 1083, 47 So. 32; State v. Ford, 37 La.Ann. 443; 16 Am.Jur.2d Evidence, § 37, p. 147; Annotation, 66 A.L.R. 1311.

When such evidence has been offered, the Court may properly give an instruction to the jury pertaining to conspiracy between the defendants, although the indictment or bill of information does not charge conspiracy. State v. Terrell, 175 La. 758, 144 So. 488; 53 Am.Jur., Trial, § 673, p. 519; Annotation, 66 A.L.R. 1311, 1314; 2 Marr's Criminal Jurisprudence (2d ed. 1923) p. 848. See also State v. Taylor,

173 La. 1010, 139 So. 463, and State v. Brasseaux, 163 La. 686, 112 So. 650.

The rule applicable here is correctly stated in 53 Am.Jur., Trial, § 673, p. 519 as follows:

> "[W]here there is evidence that the defendants had entered into a conspiracy to commit the crime charged, an instruction on the law of conspiracy is proper, and this, even though the indictment or information may not charge a conspiracy."

Contrary to the majority, I am of the opinion that the holding of State v. Terrell, supra, supports the above rule. See also State v. Capaci, 179 La. 462, 154 So. 419. On the other hand, State v. Gunter, 208 La. 694, 23 So.2d 305 and State v. Fletcher, 236 La. 40, 106 So.2d 709, relied on by the majority, hold only that the trial judge committed no error in refusing to give conspiracy instructions in those cases. Hence, the cases provide no authority for the present decision. See, in this connection, State v. Kolafa, 291 Mo. 340, 236 S.W. 302.

I am unable to subscribe to the view that the conspiracy instruction is an "abstract, inapplicable discourse on the law." In the concluding paragraph of the instruction, the trial judge clearly defined its purpose, that of determining whether one defendant's acts and declarations bound the others. As I see it, the purpose is a valid one in this prosecution.

For the reasons assigned, I respectfully dissent.

HAWTHORNE, Justice (dissenting).

I do not agree with the holding of the majority that the trial judge erred in charging the jury on the law on conspiracy. In fact, I think he was required to do so.

We are here dealing with a bill of information against three defendants, Skinner, Gueldner, and Charbonnet, for possession and sale of a narcotic drug (marihuana). It is well settled under the jurisprudence of this court that where an indictment charges that the crime was committed by two or more persons, such an indictment necessarily involves a conspiracy. State v. Ford, 37 La.Ann. 443, 459 (six defendants charged with murder); State v. Gebbia, 121 La. 1083, 1104, 47 So. 32 (two defendants charged with murder); State v. Dundas, 168 La. 95, 104, 121 So. 586 (two defendants charged with stealing cattle); State v. Gunter, 180 La. 145, 151, 156 So. 203 (two defendants charged with murder); see also State v. Brasseaux, 163 La. 686, 112 So. 650. To say that an indictment charging two or more persons with a crime involves a conspiracy does not mean that the jury may return a verdict of guilty of conspiring to commit the crime charged. What this means is that evidence of a conspiracy may be admitted without a formal allegation of conspiracy. State v. Ford, supra.

In the instant case the State offered evidence seeking to prove a conspiracy, as was entirely proper un-

der the authorities cited above. The trial judge tells us in one of his per curiams: "The State had already established that the three defendants on trial had conspired together to sell marijuana to Officer Fullington on May 21, 1965 [the date the offense was charged as having been committed]."

In charging the jury on the law of conspiracy in the present case the trial judge was following a mandate of our law, and had he failed so to charge, the defendants in this case would have had legal cause for complaint. That mandate reads: "The judge shall charge the jury on the law applicable to the case and shall charge the jury that it is their duty to accept and to apply the law as laid down for them by the judge." Former R.S. 15:385; C.Cr.P. Art. 802. This court has held that under this mandate "the judge is required to cover every phase of the case *supported by evidence* whether or not accepted by him as true. Moreover, although a judge in a criminal case is not required to charge on an issue not presented on the evidence, he should give such instructions as are pertinent to the evidence". (Italics ours.) State v. Youngblood, 235 La. 1087, 106 So.2d 689; State v. Tucker, 38 La.Ann. 536; State v. Short, 120 La. 187, 45 So. 98; State v. Robichaux, 165 La. 497, 115 So. 728.

In State v. Capaci, 179 La. 462, 154 So. 419, two persons were indicted for murder. They were tried separately, and each was found guilty of murder. On the appeal of the defendant Capaci this court said:

"The complaint that defendant was prejudiced because the court reiterated in the charge the phases of the law dealing with conspiracy is, in our opinion, frivolous. *It was the duty of the court to charge the jury fully as to the law of conspiracy in this case,* as the defendant is jointly charged with his codefendant for murder, and the indictment necessarily involves conspiracy. * * *" (Italics ours.) In support of this holding the court cited State v. Ford and State v. Gebbia, both of which I have cited above.

In State v. Terrell, 175 La. 758, 144 So. 488, three defendants, indicted for murder, were found guilty and sentenced to death. In that case, as in this one, the objection was made that it was error for the judge to give instructions on the law of conspiracy since the defendants were charged with murder and not with conspiracy. The holding of this court was that the indictment which charged the several defendants with the crime of murder involved also a conspiracy, that evidence of conspiracy was properly introduced and that it was proper for the judge to give instructions on the law of conspiracy.[1]

Not only is it the law of this state that the trial judge shall instruct the jury on the law applicable to the evidence adduced, but it is the law which prevails throughout the United States. Corpus Juris Secundum states the applicable rule as follows:

---

[1] Evidence of a conspiracy was admitted in both the Capaci and the Terrell cases.

"* * * As a general rule, the court should instruct on every essential question in the case so as properly to advise the jury of the issues * * *.

* * * * *

"Ordinarily, the court should instruct the jury on every principle of law applicable, and submit every question or issue suggested by the evidence, whether offered by the prosecution or by accused, or by both; and it is immaterial whether the jury would accept the evidence as true or in what light it was regarded by the trial judge. * * *" 23A C.J.S., Criminal Law § 1190, pp. 474-476.

Specifically, where there is evidence of a conspiracy (as there was here), Corpus Juris Secundum gives the rule thus: "Where there is evidence relating to conspiracy in committing the offense, an instruction as to such law is proper * * *." Op.cit. supra, sec. 1287, at p. 692. As authority for this statement cases are cited from Alabama, California, Colorado, Georgia, Kentucky, Michigan, Missouri, and Texas; and so far as I can ascertain, there is no case to the contrary.

R.S. 15:455 provides:

"Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought

to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his codefendant. But to have this effect a prima facie case of conspiracy must have been established."

Ultimately the question of whether a conspiracy has been established is a question of fact for the jury, but the jury must be instructed on the law of conspiracy so that this law may be properly applied once the jury has made a determination on the question of fact: Thus, if the jury finds that a conspiracy existed and that the defendant or defendants on trial were engaged in it, the jury is free to give such weight as it thinks proper to the evidence of acts and declarations of the codefendants out of the presence of one another in furtherance of the common enterprise. If, on the other hand, the jury finds that a conspiracy has not been established, such evidence should not be considered to the prejudice of the accused. State v. Gebbia, supra. It can thus be readily seen how the failure of the judge to charge the law of conspiracy may prove prejudicial, for the jury must be instructed that unless a conspiracy has been established, the acts and declarations of one defendant do not bind the other defendants. State v. Bolden, 109 La. 484, 33 So. 571; State v. Gebbia, supra; State v. Lebleu, 137 La. 1007, 69 So. 808; State v. Brasseaux, supra.

There can be no question that when evidence is adduced of, for instance, flight of the defendant or

alibi or self-defense or intoxication, it would be the duty of the trial judge to charge the law applicable to flight or alibi or self-defense or intoxication, and it would be error for him not to do so. I do not understand why the majority opinion here puts conspiracy in a different category from these other matters of which the judge is required to charge the law if evidence of them is adduced. Under former R.S. 15:385, and under Article 802 of the present Code of Criminal Procedure, the judge is required to charge the law applicable to the case, yet under the majority holding in this case, even though evidence of conspiracy is adduced and the law of conspiracy is therefore applicable, the judge will commit reversible error if he charges the law of conspiracy. In short, the statutory law requires the judge to charge the law of conspiracy when there is evidence of conspiracy, and the latest expression from this court says he must not.

The defense relies on two cases, State v. Gunter, 208 La. 694, 23 So.2d 305, and State v. Fletcher, 236 La. 40, 106 So.2d 709, both of which were cited with approval in the majority opinion. In each of those cases it was held that the refusal of the trial judge to give a special charge on conspiracy was correct and did not constitute reversible error. In my view the Fletcher case was correctly decided, since the charge was against only the one defendant and thus did not necessarily involve a conspiracy and since there was no evidence of a conspiracy adduced on the trial. The Gunter case stands alone in our juris-

prudence, and if it can be deemed authority for the holding of the majority, it is contrary to the established jurisprudence of this court, as shown by the cases cited above, as well as to the jurisprudence of other states, and contrary to the express provisions of our statutory law embodied in former R.S. 15:385 and Article 802 of our present Code of Criminal Procedure. It should therefore be disregarded or, if necessary, overruled.

UNITED STATES OF AMERICA
STATE OF LOUISIANA
SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

New Orleans, Friday, June 30, 1967

Court was duly opened pursuant to adjournment. Present Their Honors: John B. Fournet, Chief Justice, Joe B. Hamiter, Frank W. Hawthorne, E. Howard McCaleb, Walter B. Hamlin, Joe W. Sanders, and Frank W. Summers, Associate Justices.

* * * *

Rehearings were granted in the following cases: 48,-445 State v. Skinner et al.

I, Harold A. Moise, Jr., Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this Court.

In Witness Whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 22nd day of May, A. D., 1968.

HAROLD A. MOISE, JR.,
(Seal) Deputy Clerk, Supreme Court of Louisiana.

Office-Supreme Court, U.S.
FILED
AUG 15 1968
JOHN F. DAVIS, CLERK

No. 44

# In the Supreme Court of the United States

OCTOBER TERM 1968

WILLIAM SKINNER, AUGUST R. GUELDNER, AND ALTON J. CHARBONNET,

Petitioners,

v.

STATE OF LOUISIANA,

Respondent.

**On Writ of Certiorari to the Supreme Court of Louisiana To Review State of Louisiana vs. William Skinner, et al., No. 48,455 on the Docket of that Court**

## BRIEF ON BEHALF OF THE STATE OF LOUISIANA, RESPONDENT

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.

JIM GARRISON,
District Attorney for the Parish of Orleans.

LOUISE KORNS,
Assistant District Attorney for the Parish of Orleans.

## SUBJECT INDEX


| | PAGE |
|---|---|
| Statement of the Case | 1 |
| Argument | 4 |
| 1. The Absence of Charbonnet From The Hearing of Skinner's and Gueldner's Preliminary Motions | 4 |
| A. Standing To Raise | 4 |
| B. Charbonnet's Rights Were Not Infringed | 6 |
| 2. No Prejudice to the Accused Resulted Because the Trial Lasted Until 2:45 A.M. the First Day | 17 |
| 3. The Judge's Charge to the Jury on the Law of Conspiracy Was Correct | 27 |
| A. The Louisiana Law of Conspiracy | 29 |
| B. The Instant Case | 30 |
| C. Second-Crack Doctrine | 33 |
| Conclusion | 45 |


## TABLE OF AUTHORITIES

**Cases**


*Carbo v. United States*, 314 F.2d 718, cert. denied 377 U.S. 494 ..... 36, 39

*Conn. Mutual Life Ins. Co. v. Hillman*, 188 U.S. 208 ..... 35

*Crowe v. United States*, 200 F.2d 526 ..... 14

*Day v. State*, 123 Tex.Crim. 9, 57 S.W.2d 581 ..... 21

*DiCarlo v. United States*, 6 F.2d 364, 367 ..... 41

PAGE

*Duncan v. Louisiana*, U.S. ..... 36
*Evans v. United States*, 384 F.2d 393 ..... 14
*Ford v. United States*, 273 U.S. 593, 605 ..... 34
*Gila Valley Ry. Co. v. Hall*, 232 U.S. 94 ..... 36
*Glasser v. United States*, 315 U.S. 60 ..... 4
*Glouser v. United States*, 296 F.2d 853 ..... 14
*Hoffa v. United States*, 385 F.2d 201, aff'd 341 U.S. 494 ..... 40
*Jackson v. Denno*, 378 U.S. 368 ..... 40
*Jones v. United States*, 299 F.2d 661 ..... 14
*Lewis v. State*, 125 Tex.Crim. 66, 65 S.W.2 771 ..... 21
*Logan v. United States*, 144 U.S. 263 ..... 35
*Maher v. State*, 144 Neb. 463, 13 N.W.2d 641, cert. denied, 323 U.S. 757, 65 S.Ct., 91, 89 L.Ed. 606 ..... 21
*Mende v. United States*, 282 F.2d 881 ..... 20
*People v. Talbot*, 65 Cal.App.2d 654, 151 P.2d 317 ..... 38
*Pointer v. Texas*, 380 U.S. 400 ..... 10, 15
*State v. Basco*, 216 La. 365, 43 So.2d 761 ..... 13
*State v. Brasseaux*, 163 La. 686, 112 So. 6501 ..... 32
*State v. Capaci*, 179 La. 462, 154 So. 419 ..... 32
*State v. Fahey*, 35 La.Ann. 9 ..... 13
*State v. Fletcher*, 236 La. 40, 106 So.2d 709 ..... 33
*State v. Forsyth*, 229 La. 690, 86 So.2d 536 ..... 20
*State v. Ganey*, 246 La. 986, 169 So.2d 73 ..... 20
*State v. Gebbia*, 121 La. 1083, 47 So. 32 ..... 32
*State v. Gunter*, 180 La. 145, 156 So. 203 ..... 32
*State v. Gunter*, 208 La. 694, 23 So.2d 305 ..... 33
*State v. Jones*, 233 La. 775, 98 So.2d 185 ..... 20
*State v. Skinner*, 251 La. 300, 204 So.2d 370 ..... 3
*State v. Lee*, 127 La. 1077, 54 So. 356 ..... 36

PAGE

*State v. Melerine*, 236 La. 929, 109 So.2d 471 ....31, 32
*State v. Pierre*, 39 La.Ann. 9, 3 So. 60 ..... 13
*State v. Robichaux*, 165 La. 497, 115 So. 728 ..... 31
*State v. Taylor*, 173 La. 1002, 139 So. 325 ..... 32
*State v. Terrell*, 175 La. 758, 144 So. 488 .....31, 32
*Sherman v. United States*, 356 U.S. 369 ..... 9
*Snyder v. Massachusetts*, 291 U.S. 97 ..... 13
*Steele v. United States*, 267, U.S. 505 ..... 42
*United States v. Dennis*, 183 F.2d 201, aff'd, 341 U.S. 494 ..... 40
*United States v. Hoffa*, 349 F.2d 20 ..... 39

**Texts**

Am.Jur. (vol 14) 898, 899, secs. 180, 190 ..... 13
Am.Jur., Trial (vol 53) sec. 673, p. 519 ..... 33
Anno: *Continuance—Counsel—Illness or Death*, 66 A.L.R.2d 267, 275-279 (1959) ..... 21
Barnhart, *The Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1 (1947) ..... 34
Bennett, *The Louisiana Criminal Code*, 5 La.L.Rev. 6 (1942) ..... 29
C.J.S., Criminal Law (23a), sec. 1278, p. 692 ..... 33
Conrad, Modern Trial Evidence, (vol 2) 352 (1956) ..... 34
*Conspiracy Not Charged*, 66 A.L.R. 1311, 1314 (1935) ..... 33
*Evidence-Province of Judge and Jury in Determining Preliminary Questions of Fact in New York*, 23 N.Y.U.L.Q.Rev. 472 (1948) ..... 34
Fisch, New York Evidence, § 26 (1959) ..... 34

PAGE

Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv.L.Rev. 392 (1926) ..... 33

Maguire, Evidence: Common Sense and Common Law, 217, 219-220 (1947) ..... 36, 38

Maguire, *Preliminary Findings of Fact*, in Evidence: Common Sense and Common Law, 211-231 (1947) ..... 34

Marr's Criminal Jurisprudence of Louisiana, vol. 2, p. 848, (2d ed. 1929) ..... 32

McCormick, *Preliminary Questions of Fact Arising on Objections*, in Evidence, 122-126 (1954) .... 34

Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv.L.Rev. 165, 177. (1929) ..... 33, 37, 38

Morgan, *The Law of Evidence, 1941-1945*, 59 Harv.L.Rev. 481, 488-495 (1946) ..... 34

*Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue*, 20 U.Chi.L.Rev. 313, 318, n. 30 (1953) ..... 34, 36

Wharton's Criminal Law and Procedure:

(vol. 1) 171-221, Ch. 7, pp. 194-198 (Anderson, 1957) ..... 28

(vol. 4) 591, n. 12 (Anderson, 1957) ..... 31

(vol. 5) 141, sec. 2005 (Anderson, 1957) .... 13

Wigmore, Evidence (vol. 9) . 501-503 (3d. 1940) ..... 34, 37

**Statutes**

Articles 154-155 La. Code Crim. Proc. (1928) ..... 9

Article 320 La. Code Crim. Proc. ..... 19

Article 385 La. Code Crim. Proc. (1928) ..... 32

| | PAGE |
|---|---|
| Article 493 La. Code Crim. Proc. | 29 |
| Articles 831-834 La. Code Crim. Proc. | 13 |
| La. Revised Statute 14:26 | 29 |
| La. Revised Statute 15:455 | 31 |
| La. Revised Statute 40:962 | 3 |
| Fed.R.Crim., P. 8, 14 | 30 |

No. 44

# In the Supreme Court of the United States

OCTOBER TERM 1968

WILLIAM SKINNER, AUGUST R. GUELDNER AND ALTON J. CHARBONNET,

Petitioners,

v.

STATE OF LOUISIANA,

Respondent.

**On Writ of Certiorari to the Supreme Court of Louisiana To Review State of Louisiana vs. William Skinner, et al., No. 48,455 on the Docket of that Court**

## BRIEF ON BEHALF OF THE STATE OF LOUISIANA, RESPONDENT

## STATEMENT OF THE CASE

On May 21, 1965 Benjamin Fullington, an undercover agent with the Louisiana State Police, went to Skinner's Motor Mart, 2101 Canal Street in New Orleans, and told William Skinner, owner of the mart, and August Gueldner, a car salesman, two of the accused herein, that he was looking for a contact from whom he could buy marijuana. Either Gueldner or Skinner made a phone call, after which Fullington was informed that the pusher (seller) would be at the lot that afternoon. The agent left and returned around 8 in the evening, at which time Skinner introduced

Fullington to Alton Charbonnet, alias Joe Jackson, the third accused in this proceeding. Charbonnet told the agent that the stuff (marijuana) was under the seat of a white 1960 Lincoln parked on the lot, whereupon Fullington paid Charbonnet $20, went to the car indicated, and found under the front seat a matchbox filled with marijuana.[1] R. 419-487.

A week later, on May 28, 1965, Gueldner telephoned Sergeant Russell Hebert, a member of the Louisiana State Police who was working on the case as an undercover agent with Fullington. Gueldner told Hebert that the "connection" that was going to sell him marijuana was at Skinner's Motor Mart. When Hebert arrived at the lot Gueldner and Charbonnet were there, and in an empty office Charbonnet sold the agent 9 marijuana cigarettes. R. 488-489, 574-576. Also at this time Charbonnet, at Hebert's request, agreed to get some heroin for the agent. R. 577-580.

On July 30, 1965 Skinner, Gueldner and Charbonnet were arrested, R. 492-493, and shortly thereafter all three were jointly charged in the first count of a bill of information with selling marijuana to Ben Fullington on May 21, 1965, and in a second count with

---

[1]On p. 23 of their brief in support of their Petition for Certiorari petitioners cite as proof of Mr. Gill's "illness and exhaustion" at the trial the fact that he "had failed to call a key witness for the defense, a party who was to testify as to the true ownership of the automobile in which the marijuana was allegedly found." The ownership of the car parked in the lot in which Charbonnet momentarily hid the marijuana was clearly irrelevant, which is obviously why defense counsel did not bother calling a witness to testify on this point.

unlawfully possessing marijuana on that date. R. 22-23; see La. R.S. 40:962.

The accused pleaded not guilty, were tried, and were found guilty as charged on both counts. They appealed to the Louisiana Supreme Court. Although thirty-five bills of exception were reserved and perfected in the trial court, the accused relied in the Louisiana Supreme Court on six "specifications of error", involving bills numbers 6, 18, 19, 21, 23, 24, 29 and 35. On original hearing the Louisiana Supreme Court completely ignored the established jurisprudence of Louisiana and other jurisdictions and set aside the convictions and sentences herein on the ground that bill of exception number 29 was meritorious because the trial judge erred in charging the jury on the law of conspiracy. See *State v. Skinner*, 251 La. 300, 204 So.2d 370, particularly dissents of Sanders and Hawthorne, JJ., at 204 So.2d 377-380.

On application of the State of Louisiana a rehearing was granted and the convictions and sentences of Skinner, Gueldner and Charbonnet were affirmed. See 204 So.2d 380-394.

Thereafter Skinner, Gueldner and Charbonnet applied to this Honorable Court for a Writ of Certiorari to review the decision of the Louisiana Supreme Court in this matter on rehearing, relying in their Petition for Certiorari on three allegations of error involving bill of exception number 35 (which involves the absence of Charbonnet from the hearing of Skinner's and Gueldner's Preliminary Motions); bill of exception number 29 (which involves the judge's charge to the

jury on the law of conspiracy); and bill of exception number 23 (which involves the refusal of the trial judge to grant a continuance, or recess, at 11:40 p.m. on the first day of the two day trial).

## ARGUMENT

### 1. The Absence of Charbonnet From the Hearing of Skinner's and Gueldner's Preliminary Motions

This allegation of error involves bill of exception number 35, which was reserved by Alton Charbonnet when the trial judge overruled his Motion for a New Trial, in which he complained for the first time about his absence from the hearing of his coaccused's preliminary motions. R. 108, 388-390.

#### A. Standing To Raise

This particular allegation of error can obviously be urged only by Charbonnet, as Skinner and Gueldner can claim no possible prejudice to themselves arising from the absence of Charbonnet at the hearing of their pre-trial motions. See *Glasser v. United States*, 315 U.S. 60, 76-77 (1942). Skinner and Gueldner could have objected to Charbonnet's absence and refused to proceed without him; surely they could have subpoenaed Charbonnet, who had been unable to make bond, to appear at these hearings had they so wanted, or at least have served him with a copy of their pleadings. But Skinner and Gueldner clearly did not want Charbonnet to be present at these hearings because at this early stage of the proceedings Skinner and Gueldner were trying to disassociate themselves completely

from Charbonnet, who was the one who had told the undercover agent that the marijuana was under the seat of a car parked on Skinner's lot and who was paid $20 by the agent for the "stuff". See R. 42-64, esp. R. 62. Apparently Skinner's and Gueldner's only hope as they viewed the matter prior to their trial and conviction, was to repudiate Charbonnet, the most active member of the trio. After conviction, of course, they completely reversed themselves and are now seeking a new trial on this ground.

In brief filed in this Court Skinner and Gueldner maintain that *they* were prejudicted by Charbonnet's absence from the October 8, 1965 Preliminary Hearing because they were deprived "of the benefit of having Charbonnet present to hear what was being said by the State witnesses". Petitioner's brief, p. 9. Then in a vain attempt to show prejudice Skinner and Gueldner erroneously contend that "at one stage in the taking of testimony during said pre-trial hearings, the State had put forth erroneous evidence as to the identity of the undercover agent involved in a most vital part of the case. Agent Hebert was confused with agent Fullington." Brief, p. 10. It is then argued that if Charbonnet had been present at the Preliminary Hearing the defense might somehow have capitalized on this imaginary error. Brief, pp. 11-12.

The foregoing argument is simply a product of defense counsel's fertile imagination and the facts alleged therein are squarely at variance with the record in this case.

Although as originally drafted *the bill of informa-*

*tion* herein charging Skinner, Gueldner and Charbonnet with sale and possession of marijuana on May 21, 1965 erroneously recited that May 21 sale of marijuana was made to Russell Hebert, approximately a month before trial the State of Louisiana with permission of the court amended this bill of information to correctly recite that the May 21 sale of marijuana was made to Ben Fullington. See R. 6, 22. However, there was nothing erroneous or confusing about the testimony which Fullington and Hebert gave at Skinner's and Gueldner's Preliminary Hearing. On the contrary, at this hearing Fullington testified correctly that he had bought the matchbox of marijuana on May 21, 1965, and Hebert testified that he had bought the 9 marijuana cigarettes on May 28, 1965. See R. 47 et seq.; R. 96 et seq.

As Louisiana has already pointed out above, Skinner and Gueldner could have subpoenaed Charbonnet to appear at their Preliminary Hearing, and could have called him as a witness if they had so desired. They clearly did not want Charbonnet present; they did not even serve copies of their pleadings on him or his attorney.

The State of Louisiana is of the respectful view that Skinner and Gueldner cannot rely on Charbonnet's absence from the hearings of their preliminary motions in their effort to obtain a new trial from this Court.

**B. Charbonnet's Rights Were Not Infringed**

The minutes of this case show that on August

26, 1965 Alton Charbonnet pleaded not guilty to the charge of sale and possession of marijuana, as did Skinner and Gueldner, and the trial judge ordered Charbonnet to return September 2, 1965 so that the matter of counsel could be determined.[2] On September 2, the matter of Charbonnet's counsel was continued to September 10, 1965, apparently on motion of Charbonnet. Hurricane Betsy struck New Orleans and the matter was further delayed. R. 1. On September 20, 1965, Charbonnet having informed the court that he was unable to employ counsel, the trial judge appointed attorney Joseph Monie to represent Charbonnet in this case, R. 2, and from this date on Charbonnet was never without counsel. For reasons of health Monie withdrew as Charbonnet's counsel and the trial judge appointed attorney Bently Byrnes to represent Charbonnet. Byrnes became seriously ill (he died shortly thereafter), and on January 11, 1966 the court appointed attorney Bernard Burk as Charbonnet's attorney. R. 4. On January 18, 1966 Charbonnet engaged Robert Link, his present attorney, to represent him. R. 5. Apparently because of illness none of the court appointed attorneys filed any pleadings on Charbonnet's behalf. See R. 104.

[2]In brief filed in this Court petitioners contend that one of the questions presented for decision is whether Charbonnet's constitutional rights were violated because he was arraigned without counsel. See Petitioners' brief, p. 3, par. 2. Louisiana considers this contention to be completely without substance in view of the fact that 1) Charbonnet entered a plea of not guilty; 2) the trial judge ordered Charbonnet to return the following week "to determine counsel"; and 3) no further proceedings occurred at the time of arraignment. R. 1.

Meanwhile, on September 21, 1965, the day following Monie's appointment as Charbonnet's attorney, Mr. G. Wray Gill, who had been employed by Skinner and Gueldner to represent them in this case, filed, on behalf of Skinner and Gueldner only, a Motion for Bill of Particulars; a Motion for Preliminary Examination; a Motion to Quash; a Motion to Quash Application for Search Warrant, Search Warrant itself and the Return on Said Search Warrant; a Motion to Suppress and Dismiss; a Prayer for Oyer; and a Special Plea of Entrapment, R. 2, 34-40, 66-72, 101. Counsel for Charbonnet did not join in these pleadings, nor did he file similar pleadings on behalf of his client.

On September 28, 1965 the State of Louisiana in response to the pleadings filed by Skinner and Gueldner, filed an Answer to the Motion to Quash; a Bill of Particulars; an Answer to the Special Plea of Entrapment; and an Answer to the Motion to Quash Application for Search Warrant, Search Warrant itself and Return of Said Search Warrant, R. 3.

On this same day, September 28, 1965, Mr. Gill *withdrew his Motion to Quash Application for Search Warrant, Search Warrant Itself, and Return on Said Search Warrant*, R. 3, for the reason that on the hearing of the Motion to Suppress it developed that at the time the Louisiana State Police searched Skinner's Motor Mart pursuant to a search warrant following the arrest herein, *nothing was found by the police in the mart and thus there was nothing to suppress.* R.

148. It should be borne in mind that the matchbox of marijuana and the 9 marijuana cigarettes which were offered in evidence by the State of Louisiana during the trial of this case had not been seized during a search, but rather had been purchased by undercover agents Fullington and Hebert from Charbonnet on Skinner's car lot, with the aid and consent of Skinner and Gueldner. See R. 419-425.

The trial judge ruled the State of Louisiana's Bill of Particulars and Answer to Motion to Quash to be good and sufficient in law, R. 3; the Special Plea of Entrapment was overruled, R. 3. It is important to note that the factual issue of entrapment which is not for the judge to determine prior to trial but is a question for the jury as part of its function of determining the guilt or innocence of the accused, see *Sherman v. United States*, 356 U.S. 369 (1958) was raised by the three accused at the trial of this case. See bill no. 9, R. 163; see also Petitioners' brief, p. 4.

On October 8, 1965 the trial judge heard the Motion For Preliminary Examination filed by Skinner and Gueldner for the sole purpose of determining whether the State of Louisiana had sufficient evidence to make out a prima facie case against Skinner and Gueldner.[3] See R. 38-39; see Arts. 154-155 of Lou-

[3]It is important to note here that Skinner, Gueldner and Charbonnet were at this time charged in separate bills of information with both sale and possession of marijuana under R.S. 40:962 based on the May 21 transaction, *and conspiracy to sell and possess marijuana* under Article 26 of the Louisiana Criminal Code, R.S. 14:26, based on the May 28 transaction. Both the sale and possession case (the instant one) and

isiana's 1928 Code of Criminal Procedure, formerly R.S. 15:154, 155, dealing with Preliminary Examination. (At a Louisiana Preliminary Hearing pleas of guilty or not guilty are not accepted; the judge merely decides whether the accused should be bound over for indictment or trial. Compare *Pointer v. Texas*, 380 U.S. 400, 402 (1965)). At the conclusion of this hearing (contrary to the contentions made in Petitioners' brief, pp. 5, 8) the judge held that the State of Louisiana had made out a prima facie case *as far as these two accuseds were concerned*, and bound Skinner and Gueldner over for trial. ("I do feel the State has made a prima facie case, however, as far as these two defendants are concerned:" R. 64) R. 4, 64; see Art. 155 of Louisiana's 1928 Code of Criminal Procedure, formerly R.S. 15:155. On that same day the State of Louisiana filed an Answer to Prayer for Oyer, which the trial court ruled was good and sufficient in law. R. 4.

On January 18, 1966 Charbonnet decided not to rely on court-appointed attorneys (who because of illness had been able to do nothing on his behalf) and

---

the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Thus, contrary to the contention made by Petitioners on page 5 of their brief, it was quite proper for the trial judge to state at the end of Preliminary Examination, R. 64, that the State of Louisiana "has made a prima facie case of a conspiracy to sell narcotics," because the Preliminary Hearing which had just been held *involved both the instant sale and possession case and also the conspiracy case.* See R. 80-81.

engaged Robert S. Link, his present attorney, to represent him. R. 5.

On January 31, 1966 Mr. Link filed a Motion in the trial court in which motion, see R. 104-105, it is alleged that neither Alton Charbonnet nor any of his attorneys were present at the hearings of the various preliminary pleas which had been filed on behalf of Skinner and Gueldner, and the trial court is asked to make available to Charbonnet's attorney the transcript and/or record of all prior proceedings to

> "permit him to determine whether it is necessary to file supplemental motions in his own behalf and that a minimum of 30 days delay be granted in order for defense counselor to properly study and evaluate the record already taken in these matters *in order to file such pleadings as may be necessary in behalf of your defendant* ALTON J. CHARBONNET." R. 104-105. (Italics ours)

The same day as the above motion was filed, the trial judge ordered that the transcripts requested be furnished to Mr. Link. ("The Court . . . ordered the Court Reporter to furnish any and all transcripts to Mr. Link." R. 5)

However, although the pleadings and transcripts requested were promptly given to Mr. Link, and the trial in the present matter did not take place until March 21-22, 1966—almost two months later—Mr. Link filed no motions or pleadings of any kind on behalf of Charbonnet, nor were any pre-trial hearings for Charbonnet requested by him, From this inaction

on Mr. Link's part we can only infer that after studying and evaluating the pleadings, transcript, etc., which the trial court furnished him, Mr. Link decided that his client's rights had been fully protected in every way, and that no further motions needed to be filed on Charbonnet's behalf. This view gains considerable weight from Petitioners' brief, in which they concede on pages 10-11 that Mr. Link decided as a matter of strategy not to ask for special pre-trial hearings on behalf of Charbonnet. Also, the trial judge's action in delaying the trial at the request of Mr. Link indicated the willingness of the trial court to entertain and hear any pleas, motions, etc., which Charbonnet might have wished to file prior to trial.

Furthermore, Mr. Link made no objection prior to trial, or at any time during trial, to Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner, and no prejudice to Charbonnet because of his absence was at any time called to the trial court's attention.[4] In this connection it is important to note that the two witnesses who testified at the hearing of the preliminary motions—Fullington and Hebert—repeated their testimony at the trial, at which time they were cross-examined by Charbonnet's counsel. R. 479-482, 579-582. It was only after the trial was finished and Charbonnet had been found guilty by the jury that Mr. Link, in a Motion

[4]In fact, Mr. Link used the transcript of the testimony offered at Skinner's and Gueldner's Preliminary Examination to cross-examine witnesses who testified at the trial of this case. See, e.g. R. 481-482.

For New Trial, *for the first time* complained to the trial judge of Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner. See R. 108.

It is settled in the jurisprudence of Louisiana, and elsewhere, that an accused need not be present during the hearing of preliminary motions addressed to the court, and not making part of the actual trial of the guilt or innocence of the accused. *State v. Basco*, 216 La. 365, 43 So.2d 761; *State v. Pierre*, 39 La.Ann. 9, 3 So.60; *State v. Fahey*, 35 La.Ann. 9; 5 Wharton, Criminal Law and Procedure 141, sec. 2005 (Anderson, 1957); compare Articles 831, 834 of the present Louisiana Code of Criminal Procedure and Comments thereunder ("the defendant's presence is not required when motions are made and determined by the court outside of the jury's presence").

In *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934), this Court said that in a prosecution for a felony an accused who is being tried in a State court "has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." However, the opinion in *Snyder* draws a distinction between proceedings at the trial and those before and after ("Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals." 291 U.S. 107). To the same effect are the authorities cited in Petitioner's brief, pages 15-16. For example in 14 Am.Jur. 898,

899, secs. 189, 190, appears the following pertinent material:

> "At common law and under the decisions of many courts it is the right of the prisoner in a criminal case to be present throughout the entire trial from the commencement of the selection of the jury until the verdict is rendered and jury discharged. . . . The Supreme Court has taken the view that the presence of the defendant is a condition of due process under the Fourteenth Amendment to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."
>
> "* * *
>
> "The right to be present extends to every part of the trial proper. The defendant should be present on arraignment, when evidence is given, when the jury is charged, when the court communicates with the jury in answering questions by them, when the jury receives further instructions, when the verdict is returned, and when evidence is introduced for the purpose of determining the amount of punishment to be imposed. The right does not extend to matters not a part of the trial, such as matters purely preliminary to trial."

The cases relied on by Petitioners on page 16 of their brief—*Evans v. United States*, 284 F.2d 393 (6th Cir. 1960); *Jones v. United States*, 299 F.2d 661 (10th Cir. 1962); *Crowe v. United States*, 200 F.2d 526 (6th Cir. 1952); *Glouser v. United States*, 296 F.2d 853 (8th Cir. 1961)—are clearly not relevant to the present proceeding as all of these cases involve the

presence of the accused during the trial itself or later at sentencing.

Furthermore, *Pointer v. Texas*, 380 U.S. 400 (1965), also relied on by Petitioners, is irrelevant herein. There Pointer and Dillard were arrested and taken before a Texas judge for a Preliminary Hearing on a charge of having robbed Kenneth Phillips of $375. At this Preliminary Hearing neither of the accused had a lawyer. Phillips, testifying for the State, gave his version of the robbery in detail and identified Pointer as the man who had robbed him, but Phillips was not effectively cross-examined at this hearing because the accused were not represented by counsel at this time. Subsequently, Pointer was charged with the robbery, but before the trial could be held Phillips moved to California. At Pointer's trial on the robbery charge the State of Texas, being unable to produce Phillips as a witness, offered in evidence the transcript of the testimony which Phillips had given at the Preliminary Hearing. Eventually this Court granted certiorari and reversed Pointer's conviction on the ground that use of the transcript of Phillip's statement at Pointer's trial denied Pointer his right of cross-examination and his Sixth Amendment right to confront the witnesses against him and thus deprived him of a fair trial.

The case at bar is clearly distinguishable from *Pointer*. In the present proceeding, unlike the *Pointer* case, the witnesses who testified at the Preliminary Hearing and at the hearing of the abortive Motion to Suppress (Benjamin Fullington, R. 43-63; Russell

Hebert, R. 74-99) also testified at Charbonnet's trial, and were cross-examined at this time by Charbonnet's attorney, Mr. Link, and consequently Charbonnet's right to confront the witnesses against him, guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution under *Pointer v. Texas, supra*, was in no way infringed. See R. 479-482, (cross-examination of Fullington); R. 579-582 (cross-examination of Hebert).

Moreover, unlike *Pointer*, in the instant case, although the transcript of the witnesses' testimony at the pre-trial hearings was of course not offered in evidence at the trial itself, counsel for Charbonnet used this prior transcribed testimony, which had been furnished him prior to the trial upon counsel's request and by order of the court, in attempting to impeach Fullington when cross-examining that witness. See R. 481-482.

In summation, Louisiana's position in regard to Charbonnet's absence from the hearing of the preliminary motions filed by his coaccused is as follows: First, that the presence of Charbonnet was not required during the hearing of the various pre-trial motions filed by Skinner and Gueldner in the instant case, as the question of Charbonnet's guilt or innocence was not involved therein, nor was there any ruling on the admissibility of evidence to be used at the trial; second, the State of Louisiana is of the respectful opinion that Charbonnet has waived all rights in the matter because the trial court at defense counsel's request furnished Mr. Link with copies of all pleadings and a transcript of all the evidence involved in these

preliminary matters, and allowed Mr. Link two months prior to trial in which to file any pleadings which Mr. Link thought necessary on behalf of Charbonnet; and third, any error, if it occurred, was harmless, because the witnesses who testified at the hearing of the preliminary motions repeated their testimony at the trial and were cross-examined at this time by Charbonnet's attorney, and at no time has Mr. Link pointed out how Charbonnet was prejudiced or how he suffered any unfairness because of his absence from these pre-trial hearings.

**2. No Prejudice to the Accused Resulted Because the Trial Lasted Until 2:45 A.M. the First Day**

This allegation of error centers around bill of exception number 23, which was reserved after the trial judge refused to grant a recess of more than 35 minutes after the prosecution rested at 11:30 p.m. on the first day of the two day trial. R. 221-228.

The trial of the instant case began on the morning of March 21, 1966. R. 6. After the jury had been selected the court ordered a recess for lunch. R. 7. At 2:45 p.m. the jurors returned to their seats in the jury box and the court ordered the trial to proceed. R. 7. From 6:15 to 8 p.m. there was a recess for dinner. R. 9. At 11:40 the State rested its case. R. 11. At this time defense counsel complained of feeling tired and asked for a recess. R. 604.

BY THE COURT: You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight.

Go to work and see if we can't finish the case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much . . .

BY MR. GILL: I want to say one thing, Your Honor, I have a severe case of diabetes.

BY THE COURT: I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.

BY MR. GILL: May I further say this. I tested myself for sugar . . .

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please, I respectfully request Your Honor declare a mistrial.

See R. 604-605.

To the overruling of his Motion for a Mistrial Mr. Gill reserved bill 23. R. 604-605, 221.

The defense then took a recess of thirty-five minutes and proceeded to put on its case from 12:25 a.m. until 2:45 a.m., when the defense rested. R. 12, 605-688. During these two hours and twenty minutes Mr. Gill called to the stand Thomas Cardona, R. 606-611;

James Comeaux, R. 611-613; Joseph Marino, R. 613-618; Hugh Wilbourn, R. 618-619; Marie Wilbourn, R. 620-621; Gilbert Andry, R. 621-624; Floyd Russell, R. 624-626; Virgie Niette, R. 626-639; Helaine Harp, R. 639-647; Bobbie Moffett, R. 648-652; Walter Gordon, R. 652-658; Bernard Sweeney, R. 659-660; Alfred Middleton, R. 660-662; Mrs. Charles Arbour, R. 662-667; Charles Arbour, R. 667-671; Bernard Keenal, R. 671-680; and Stevanna Stevens, R. 680-687. All of these witnesses were extensively questioned by defense counsel.

The defense rested at 2:45 a.m., court recessed a little before 3 a.m., and reconvened at 9:30 the following morning. R. 687, 12. It is important to note that neither Mr. Gill nor Mr. Link objected when at 2:45 a.m. the trial judge declared a recess until 9:30 a.m. See R. 12. When court convened the next morning at 9:30 a.m. no complaint was made to the court by defense counsel about lack of sleep, fatigue or illness. Mr. Gill and Mr. Link made their closing arguments to the jury on behalf of the accused and the trial judge charged the jury, which then retired to deliberate at 2:45 p.m. At 5:10 p.m. the jury announced to the court their verdict of guilty as charged on both counts as to all three of the accused. R. 12-13.

Under Article 320 of Louisiana's 1928 Code of Criminal Procedure, then R.S. 15:320, the granting or refusing of a continuance (or recess as it is called after the trial has begun) is within the sound discretion of the trial judge. It is well settled that the trial judge's refusal to grant a continuance or recess will not be

reversed on appeal unless his ruling is found to be arbitrary and prejudicial. See *State v. Ganey*, 246 La. 986, 169 So.2d 73; *State v. Jones*, 233 La. 775, 98 So.2d 185; *State v. Forsyth*, 229 La. 690, 86 So.2d 536.

The State of Louisiana concedes that it was hard on the lawyers involved to get only a few hours of sleep on the night of March 21-22, 1966, during the trial of this case, but how were the accused prejudiced?

As the record herein bears out, Mr. Gill and Mr. Link called seventeen witnesses and put on a vigorous defense on the night of March 21-22. On the morning of March 22 Mr. Gill and Mr. Link made spirited arguments to the jury on behalf of the three accused—Mr. Gill's closing argument lasted for about an hour and a half. And during this time the defense reserved 8 bills of exception (bills 23-30).

Petitioners argue to this Court that the trial judge should have granted a recess at 11:40 p. m. on the first day of the trial because Mr. Gill was ill and tired. The answer to this contention is that Mr. Gill nevertheless conducted a competent defense in this case. If the contrary situation had prevailed, and Mr. Gill, or his associate, had not been able to adequately defend the accused, the trial judge would undoubtedly have called a recess before 2:45 a.m.

In *Mende v. United States*, 282 F.2d 881 (9th Cir. 1960), trial counsel requested a continuance because of a facial affliction. In finding no abuse of discretion on the part of the trial judge who denied the continuance, the Court of Appeals for the Ninth Circuit said:

"The transcript indicates that this trouble did not affect the quality of counsel's mental activity."

It was held in *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641, cert. denied 323 U.S. 757, 65 S.Ct. 91, 89 L.Ed. 606, that since it appeared from the record that defense counsel was vigorously active in behalf of his client and fully protected his interest throughout the trial, there was no abuse of discretion in denying a continuance requested because of counsel's health.

In *Day v. State*, 123 Tex.Crim. 9, 57 S.W.2d 581, in approving the refusal of a continuance where it had been claimed that the accused's attorney was suffering from a throat infection making it difficult for him to talk, the court noted the trial judge's statement that the defense was conducted very ably and that there was no difficulty in hearing counsel.

It was held in *Lewis v. State*, 125 Tex.Crim. 66, 65 S.W.2 771, that there was no error in refusing a continuance where an attorney who claimed to have been so ill as to be unable to properly represent his client appeared at the trial, ably presented the case, examined the witnesses and argued to the jury, showing no effects of his alleged illness.

For a discussion of the above cases and others on the same point, see Anno: Continuance—Counsel—Illness or Death, 66 A.L.R.2d 267, 275-279 (1959).

As for the contention raised *for the first time in Motion For a New Trial* that a couple of the jurors had fallen asleep during the trial, this Court's attention is directed to the fact that no objection to sleeping jurors was made at the trial. Mr. Gill admits that he

made no such objection during trial, excusing himself on the ground that he was too tired to object at the time. R. 323. However, we note that Mr. Gill was not too tired at this time to call and examine 17 defense witnesses, argue to the jury for an hour and a half and reserve eight other bills of exception (bills 23-30). Further, all of the jurors who testified at the hearing of the Motion For a New Trial *categorically denied that any member of the jury had at any time been asleep during the trial.*

In brief filed in this Court Petitioners allege that at the hearing of the Motion For New Trial there was testimony by jurors, bystanders and the trial judge's crier that two jurors had apparently been sleeping, or at any rate had their eyes closed, during the trial. Brief, pp. 19-20. An examination of the testimony which was taken at the New Trial hearing shows that there is no credible evidence to suggest that any juror was sleeping at any time during the trial of this case.

In this connection it is significant to note that although defense counsel summoned to this hearing all thirteen of the petit jurors who sat on this case (12 regular jurors and 1 alternate), and twelve of the summoned jurors appeared, defense counsel only called three of the jurors to the witness stand, permitting the trial court to discharge the other nine after the first two jurors called to testify (Landry and Wilson) denied that they or anyone else on the petit jury had been either asleep or excessively tired during the trial of this case. See R. 259-281, 309.

Moreover, the six witnesses who testified that some of the jurors were sleeping during the trial were all either defense witnesses, or were employees, relatives or close friends of one or more of the accused, or both. Further, the testimony of those interested witnesses is in complete disagreement as to whether the allegedly sleeping jurors were one or two in number, whether the sleeping occurred in the front or back row of the jury box, and whether the sleeping occurred during the late night hours when the defense was putting on its case or only the next morning while closing arguments were being made to the jury, no single witnesses testifying that the sleeping occurred at both times. The only point of agreement among the various witnesses is that the sleeping juror, or both sleeping jurors, were one or both of the Negro jurors who sat on the case. See R. 282-321.

The only credible evidence on this issue is the testimony given by Sal Marchese, the trial judge's crier; the testimony of Landry, Wilson and Jones, the three jurors who were called to the stand; and the finding of fact which was made by the trial judge. Marchese testified that on the second day of the trial, during the closing argument to the jury by Mr. Gill, he noticed Mr. Landry, one of the colored jurors, sitting in a relaxed position with his eyes closed and his head leaning on his hand. R. 350-351. Landry testified that at no time did he go to sleep or even doze during the trial, and that he did not feel excessively tired at this time. R. 259-271. Wilson, who apparently brought in a vote of Not Guilty in the instant

case (the jury verdict was 9-3; See Art. 7, Sec. 41, La. Const.), testified that no one on the jury was at any time sleeping or nodding, or even appeared to be very tired. R. 271-281. Jones testified that he was tired when the trial lasted into the morning hours on the first day, and rested his eyes once in a while, but that at no time was he asleep, and that when the trial judge sometime between 1:30 and 2 in the morning asked all of the jurors whether or not they wanted to continue with the trial or to recess to the next day, he had answered that he wanted to "finish up". R. 346-348. The trial judge states that the defense "offered no proof whatsoever" that any of the jurors was asleep. R. 395.

The fact that defense counsel made no objection to sleeping jurors during the trial is a very strong factor to be considered by this Court in determining the credibility of the evidence offered on this question at the New Trial hearing, in the respectful opinion of the State of Louisiana. Surely astute defense counsel such as Mr. Gill and Mr. Link would have called the trial judge's attention to such a state of affairs if it had in fact existed, and would have immediately requested a mistrial. Further, if one of the jurors had fallen asleep during the trial of this case, and the trial court's attention had been directed to that fact, the sleeping juror could have been dismissed by the trial judge and his place taken by the alternate juror, Gaston F. Moore, Jr., who was there in the event of just such an emergency. See R. 257, 255-256.

It is not as though the attorneys and the jury in

the instant case were required to work night after night and day after day with little or no sleep. The episode complained of amounted to *one night;* the trial was finished by the afternoon of the following day. Surely adult men can miss a little sleep one night without having their faculties impaired.

Moreover, the record in this case shows that Mr. Gill had *already been granted a great number of continuances* in the trial of the present matter. On January 18, 1966, on motion by defense the matter was continued until January 31, 1966. R. 5. On January 31, 1966, on motion by Mr. Gill the matter was continued until February 24, 1966. R. 5. On February 24, 1966, on motion by the defense the court ordered the case continued until March 15, 1966. R. 6. On March 15, 1966, on motion by defense the proceeding was continued until March 21, 1966. R. 6. As the trial judge told Mr. Gill when refusing to grant him a continuance at 12 midnight on March 21, 1966, "I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case." R. 605.

The State of Louisiana calls this Court's attention to the fact that 1) Mr. Gill produced no medical evidence whatsoever on the night of the trial when he asked for and was refused a continuance; 2) nor did Mr. Gill or Mr. Link object and ask for a longer recess when, at 2:45 a.m., the trial court adjourned until 9:30 a.m. the following day, R. 12; 3) nor did Mr.

Gill produce medical evidence of disability the following morning; (4) or even ask for a continuance at this later time; and 5) Mr. Link never at any time complained of fatigue or asked for a recess. It was only *months later*, at the hearing of the Motion For a New Trial, that Mr. Gill called his physician, Dr. Ben Morrison, into court to give evidence about counsel's alleged ill health at the time of the trial. R. 337 et seq. If Mr. Gill had really been ill on the night of the trial, he could easily have contacted Dr. Morrison during the thirty-five minute recess which preceded the putting on of the defense herein, and Dr. Morrison could have offered evidence on the condition of Mr. Gill's health to the court that very night, or the following morning before court reconvened at 9:30 a.m. Also, it should be noted that Mr. Gill's associate, Mr. Robert Link, was at all times present in court and ready to assist Mr. Gill during the trial, but was never called on for help by Mr. Gill, who conducted the defense of Skinner and Gueldner himself. R. 605-688. And finally, this Court's attention is called to the fact that Mr. Gill's stay in the hospital following the trial of this case was for.

In concluding argument on this third allegation of error the State of Louisiana respectfully contends to this Court that the accused herein suffered no prejudice from the ruling of the trial judge refusing to grant the defense more than a 35 minute recess after the prosecution had rested on the first day of the trial. That the accused were in no way prejudiced by this ruling is clear from the vigorous defense put on by

Mr. Gill and Mr. Link on the night of March 21-22, when they called seventeen witnesses to the stand, and questioned them at great length; from their vehement arguments to the jury the following morning (Mr. Gill's argument lasted about 1½ hours); and from the many bills of exception reserved by defense counsel during this period of the trial. In addition, the testimony of the jurors who took the stand at the hearing on the Motion For a New Trial showed positively that the jury in this case wanted to work late into the night and had so informed the judge, and that the jurors remained alert and interested in the proceedings throughout the trial. The treatment of a Chronic condition and had been arranged prior to the trial. R. 328-329.

### 3. The Judge's Charge to the Jury on the Law of Conspiracy Was Correct

This allegation of error is grounded on bill of exception number 29, which was reserved to that portion of the trial judge's charge to the jury which dealt with criminal conspiracy. R. 252-253. For this portion of the judge's charge, see per curiam of trial judge to bill 29, R. 356-359. Among other things the trial judge's general charge contained the following pertinent material:

> "The weight and sufficiency of the evidence to prove a criminal conspiracy is a matter for the jury, and so is the existence of the conspiracy.
>
> "* * *
>
> "When a conspiracy is entered into to do an

unlawful act, all persons engaged therein are responsible for all that is done in pursuance thereof by any of the conspirators, until the object for which the conspiracy was entered into is fully accomplished.

"This responsibility is not confined to the accomplishment of the common design for which the conspiracy was entered into, but it extends to, and includes, collateral acts and (those) incidental (to) and growing out of the common design.

"It is for you to determine, gentlemen, as a matter of fact, from all of the evidence submitted to you, whether or not a conspiracy has been established, beyond a reasonable doubt, and that the defendants on trial were engaged in the said conspiracy.

"*Unless you are satisfied that a conspiracy has been established I charge you that the acts and declarations of one of the parties to the alleged conspiracy do not bind the other.*"
R. 357-359. [5]

---

[5]Petitioners did not object to the above portion of the judge's charge on the ground that it was an incorrect statement of the law of conspiracy. For the correctness of the judge's definition of criminal conspiracy, see 1 Wharton's Criminal Law and Procedure 171-221, Ch. 7, esp. pp. 194-198 (Anderson 1957). Rather, their objection appears to be grounded on the theory that it was error to charge the jury concerning the law of conspiracy because conspiracy was not formally charged in the bill of information. See Petitioners' brief, p. 24, in which they say that the trial judge "gave a charge on the full law of conspiracy although no conspiracy was charged in this case."

**A. The Louisiana Law of Conspiracy**

Before proceeding further the State of Louisiana would like to discuss briefly the crime of conspiracy as defined by Article 26 of the Louisiana Criminal Code. R.S. 14:26. In Louisiana, unlike some jurisdictions, conspiracy is the agreement or combination of two or more persons for the specific purpose of committing a crime and is an inchoate offense, similar to attempt, although unlike attempt, a person can be prosecuted for both the conspiracy and the completed offense. Under Article 26 of the Louisiana Criminal Code, R.S. 14:26, the punishment prescribed for conspiracy to commit a crime is considerably less than the punishment prescribed for commission of the crime itself. Thus, in Louisiana the State does not prosecute a person for conspiracy unless the intended offense is not completed, or proof of the consummated crime is difficult, or the completed crime occurs in another jurisdiction. For a discussion of the Louisiana law of conspiracy as embodied in Article 26, see Bennett, *The Louisiana Criminal Code*, 5 La.L.Rev. 6, 19. (1942).

Furthermore, in Louisiana an indictment which charges conspiracy to commit a crime in one count and the crime itself in another count is bad for duplicity because although conspiracy is an inchoate crime, nevertheless when the basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and under Article 493 of the Louisiana Code of Criminal Procedure no indictment may charge more than one offense. See also

former R.S. 15:217, the predecessor of Article 493, which was in effect at the time the instant case was tried; compare Fed.R.Crim. P. 8, 14, which allow a joinder of offenses in an indictment if the offenses constitute part of a common plan, and if the accused is not prejudiced thereby.

From the foregoing it is evident that in the instant case the State of Louisiana could not have charged these accused in one bill of information with both sale and possession of marijuana on May 21, 1965 and conspiracy to sell and possess marijuana on this or any other date.

**B. The Instant Case**

In the instant case Skinner, Gueldner and Charbonnet were jointly charged in two counts of a bill of information with possessing and selling marijuana on May 21, 1965.[6] R. 22-23. It is settled in Louisiana that where an information charges two or more persons jointly with a crime, *the charge involves a conspiracy* although the information does not expressly

[6]As was pointed out in footnote 3, Skinner, Gueldner and Charbonnet were also charged in a separate bill of information with conspiracy to sell and possess marijuana under Article 26 of the Louisiana Criminal Code, R.S. 14:26, the conspiracy charge being based on the May 28 sale. Both the sale and possession case (the present one) and the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Further, the Preliminary Hearing which was held on behalf of Skinner and Gueldner involved both the instant sale and possession case and the conspiracy case, although the present sale and possession case was tried separately from the conspiracy charge, which has never been tried.

charge conspiracy in formal terms. *State v. Robichaux*, 165 La. 497, 115 So. 728; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Melerine*, 236 La. 929, 109 So.2d 471. Hence the instant charge of sale and possession against Skinner, Gueldner and Charbonnet involves a conspiracy under Louisiana law, and under the law of many other jurisdictions. See 4 Wharton's Criminal Law and Procedure 591, esp. n. 12 (Anderson 1957).

During the instant trial, frequent objections to testimony were made by Mr. Gill on behalf of Skinner and Gueldner on the ground that the conversation, act, etc., referred to by the witness occurred out of the presence of his clients, and that conspiracy had not been charged in the bill of information herein. See, *e.g.*, bill of exception number 19, R. 206. The trial judge correctly overruled all such objections on the basis that the bill of information herein jointly charges the 3 accused with possessing and selling marijuana, that the State of Louisiana had made out a prima facie case of conspiracy, and that consequently the evidence was admissible under La. R.S. 15:455, which provides that each co-conspirator is deemed to commend whatever is said or done in furtherance of the common enterprise, and it is of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, but to have this effect a prima facie case of conspiracy must have been established. R. 209.

The trial judge's ruling was in accord with the settled jurisprudence of the Louisiana Supreme Court.

See *State v. Gebbia*, 121 La. 1083, 47 So.32; *State v. Brasseaux*, 163 La. 686, 112 So. 6501; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Gunter*, 180 La. 145, 156 So. 203; *State v. Melerine*, 236 La. 929, 109 So.2d 471; see also Marr's Criminal Jurisprudence of Louisiana, vol. 2, p. 848 (2d ed. 1923).

Later, in giving his charge to the jury the trial judge instructed the jury in detail on the definition and nature of conspiracy, told the jurors that it was for them to determine, from the evidence, whether or not a conspiracy had been established by the State of Louisiana, and that unless they were satisfied that a conspiracy had been shown, "I charge you that the acts and declarations of one of the parties to the alleged conspiracy do not bind the others". [7] R. 356-359.

In charging the jury in the present case on, among other things, conspiracy, the trial judge was following the mandate of Article 385 of Louisiana's 1928 Code of Criminal Procedure, formerly R.S. 15:385, and the unquestioned rulings of the Louisiana Supreme Court. See *State v. Taylor*, 173 La. 1002, 139 So. 325; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Capaci*, 179 La. 462, 154 So. 419. [8]

[7] In their Petition for Certiorari filed in this Court petitioners contend that they were prejudiced by the judge's charge to the jury on conspiracy. The State of Louisiana believes that the contrary is true, and that the judge's admonition to the jury not to impute the acts and declaration of one of the 3 accused to the other 2 unless a conspiracy had been proved beyond a reasonable doubt, was helpful to the accused, if anything, and certainly not prejudicial.

[8] In reversing the conviction on first hearing on the ground that the trial judge erred in charging the jury on con-

This Court's attention is directed to the fact that it is the prevailing rule *in many jurisdictions* that where there is evidence that the accused have entered into a conspiracy to commit the crime charged, an instruction to the jury on the law of conspiracy is proper, even though the indictment or information does not formally charge a conspiracy. See 53 Am.Jur., Trial, sec. 673, p. 519; 23A C.J.S., Criminal Law, sec. 1278, p. 692; Conspiracy Not Charged, 66 A.L.R. 1311, 1314 (1935)

**C. Second-Crack Doctrine**

Furthermore if the issue posed by the trial judge's charge to the jury in the instant case is viewed as a question of whether the judge or the jury should pass on the admissibility of evidence during a criminal trial, it is submitted that Louisiana's "second-crack" method of dealing with this problem is the best of the various solutions which have been proposed by the eminent legal scholars who have wrestled with the issue. For material dealing with this question, see Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv.L.Rev. 392 (1926); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv.L.Rev.

---

spiracy, the Louisiana Supreme Court relied on its decisions in *State v. Fletcher*, 236 La. 40, 106 So.2d 709; and *State v. Gunter*, 208 La. 694, 23 So.2d 305, which are contrary to the great weight of the Louisiana jurisprudence on this point, and which simply hold that it was not reversible error in those particular cases for the trial judge to fail to charge the jury on conspiracy.

165 (1929); Morgan, *The Law of Evidence, 1941-1945*, 59 Harv.L.Rev. 481, esp. "Function of Judge and Jury," 488-495 (1946); McCormick, *Preliminary Questions of Fact Arising On Objections*, in Evidence 122-126 (1954); 9 Wigmore, Evidence 501-503 (3d ed. 1940); Maguire, *Preliminary Findings of Fact*, in Evidence: Common Sense and Common Law 211-231 (1947); *Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue*, 20 U. Chi. L.Rev. 313 (1953); Barnhart, *The Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1, 17-20 (1947); *Evidence-Province of Judge and Jury in Determining Preliminary Questions of Fact in New York*, 23 N.Y.U.L.Q.Rev. 472 (1948); 2 Conrad, Modern Trial Evidence 352 (1956); Fisch, New York Evidence § 26 (1959).

Although the general rule is that in a criminal trial the question of the admissibility of evidence is a matter for the trial judge rather than the jury to determine, *Ford v. United States*, 273 U.S. 593, 605 (1927), cases in which the preliminary question of fact coincides with the ultimate issue for the jury pose perplexing problems. A trial involving a conspiracy is a prime example of such a coincidence case. See *Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue*, 20 U. Chi. L.Rev. 313 (1953); Barnhart, *The Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1 (1947).

La. R.S. 15:455 provides that each coconspirator

is deemed to assent to or commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, but to have this effect a prima facie case of conspiracy must have been established.

La. R.S. 15:455 is a codification of the rule of evidence which governs trials involving conspiracy in all jurisdictions. See *Logan v. United States*, 144 U.S. 263, 308-309 (1892); *Conn. Mut. Life Ins. Co. v. Hillman*, 188 U.S. 208, 218 (1902); 1 Wharton's Criminal Law and Procedure 194-198 (Anderson, 1957).

The question which has perplexed many courts and legal writers is whether the trial judge or the jury should determine the existence of a conspiracy as a preliminary fact in order to bring into play the rule of evidence that a conspirator is bound by the acts and declarations of his coconspirator which take place out of his presence.

The orthodox rule is that the admissibility of a given piece of evidence is for the judge to determine. See 9 Wigmore, Evidence 501 (3d ed. 1940). However, in cases, such as those involving conspiracy, in which the question of admissibility merges imperceptibly into the weight of the evidence and the preliminary question of fact is in effect indistinguishable from the ultimate issue of guilt or innocence, to permit the trial judge alone to decide the preliminary question results in depriving the accused of his right to trial by jury.

See Maguire, Evidence: Common Sense and Common Law 217 (1947); compare *Duncan v. Louisiana*, ____ U.S. ____ (1969). For example in the classic case of *State v. Lee*, 127 Lo. 1077, 54 So. 356 (1911), it was agreed that Mack Lee had committed the murder for which the accused was being tried. The accused insisted that he was not Mack Lee, but rather Guy Fenner. At the trial the defense offered Mrs. Mack Lee as a witness to testify that the accused was not her husband. In Louisiana at that time a wife could not testify for or against her husband. Upon objection by the prosecution the trial judge found that Mrs. Mack Lee was in fact the wife of the accused and on this basis sustained the objection and excluded the witness' testimony, assigning as his reason that he was satisfied that the prisoner was Mack Lee. Thus, in *Lee* since the evidence excluded was decisive, it can be argued that the judge rather than the jury decided the guilt of the accused. See *Role of Judge Where Preliminary Questions of Competency Coincides With Ultimate Issue*, 20 U. Chi. L.Rev. 313, 316 (1952). Fortunately, the conviction was reversed on another ground.

For a more recent case in which the trial judge determined a disputed preliminary question of fact which coincided with the ultimate jury question on the merits, see *Carbo v. United States*, 314 F.2d 718, 735-737 (9th Cir. 1963). See also *Gila Valley Ry. Co. v. Hall*, 232 U.S. 94 (1913), in which one of the questions was whether the plaintiff, Hall, knew of a defect in a wheel. A witness was offered to testify that one Regna remarked about a crack in the wheel within Hall's hear-

ing prior to the accident in which Hall was injured. Upon objection by the defense the judge ruled that Regna's testimony was inadmissible apparently being of the opinion that Hall had not heard it. This Court upheld the judge's determination of this question of fact on the ground that "questions of the admissibility of evidence are for the determination of the court." 232 U.S. at 103. However, it has been suggested that the issue of whether Hall heard Regna's remark, and thus had notice of the defective wheel, was a matter which should have been decided by the jury rather than the judge. See Morgan, *Functions of Judge and Jury*, 43 Harv. L.Rev. 165, 172 (1929).

The opinion has been advanced by one text writer that if the judge can determine such matters, then by clever manipulation he can remove almost any material issue from the province of the jury. See Morgan, *Functions of Judge and Jury*, 43 Harv. L.Rev. 165, 172 (1929).

Louisiana believes that the criticism of the orthodox rule in coincidence cases is justified because it permits the trial judge to usurp the jury's role.

In direct contrast to the orthodox rule, some questions of admissibility are left entirely to the jury in a number of jurisdictions. This practice has also been criticized on the ground 1) that it is a needless abdication of the judicial function, and 2) that it results in a total abandonment of exclusionary rules wherever their applicability depends upon the decision of a preliminary question of fact. See 9 Wigmore, Evidence 502-

503 (3d ed. 1940); Morgan, *Functions of Judge and Jury*, 43 Harv.L.Rev. 165, 177 (1929).

Louisiana courts, like those of many jurisdictions, have abandoned the orthodox rule in cases involving conspiracy, such as the instant one, and have substituted therefore the "second-crack" doctrine, whereby the judge admits the questioned evidence upon a prima facie showing by the prosecution that a conspiracy exists among the joint accused, and then at the end of the trial instructs the jury not to impute the acts or declarations of one accused to the others unless the jury is convinced beyond a reasonable doubt that a conspiracy existed among the accused. See 2 Marr's Criminal Jurisprudence of Louisiana 848 (2d ed. 1923); Barnhart, *The Determination of Facts Preliminary to the Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1, 17-20 (1947); *People v. Talbot*, 65 Cal.App.2d 654, 151 P.2d 317 (1944);[9] Maguire, Evidence: Common Sense and Common Law 219-220 (1947). Such a procedure, in the respectful view of Louisiana, permits both the judge and the jury to perform their traditional roles, and thus combines the best features of the two extreme views described above. In fact, one writer suggests that under this method of handling the question the merits of the orthodox rule

[9]*People v. Talbot*, supra, contains a very shrewd analysis of the problem from a criminal procedure viewpoint, noting that there is no need for conspiracy instructions to the jury even in a case involving a conspiracy unless during the trial the prosecution invokes the rule of evidence pertaining to the acts and declarations of a conspirator, such as La. R.S. 15:-455, in which case such an instruction is imperative.

are lost. See *Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue*, 20 U.Chi.L.Rev. 313, 318, n. 30 (1952).

A recent case which treated the question here at issue in the same way that it is handled in the Louisiana courts is *United States. v. Hoffa*, 349 F.2d 20, 41-42 (6th Cir. 1965). Here the accused were originally charged in one count of an indictment with endeavoring to influence, intimidate and impede petit jurors in the discharge of their duties and in another count of the indictment with conspiracy to commit this crime. Prior to trial the count charging conspiracy was severed by order of the court. Nevertheless, during the trial for the substantive crime evidence of a conspiracy was admitted, just as in the instant proceeding, apparently in order to bring into play the federal rule of evidence which is similar to La. R.S. 15:455. At the conclusion of the trial, also as in the instant case, the judge defined conspiracy and instructed the jury that it could consider an out-of-court statement only as to the particular accused who made the statement, unless the jury was satisfied that the person making the statement was a co-conspirator of one or more of the other accused, in which event the jury could consider such evidence against any other accused shown by the evidence to have been a co-conspirator. On appeal the accused contended that the trial court should have determined as a matter of law whether there was proof of a conspiracy instead of submitting the question to the jury, relying on *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), cert.

denied 377 U.S. 953 (1964); and *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), aff'd 341 U.S. 494 (1951) (limited to the validity of Sections 2 and 3 of the Smith Act). The Sixth Circuit Court of Appeals affirmed the convictions holding that there was sufficient evidence to make out a prima facie case linking appellants with the conspiracy, and that submitting the issue to the jury instead of determining it as a matter of law was more favorable to appellants, and they were not prejudiced thereby. This Court granted certiorari and affirmed, but limited its grant of certiorari to the single issue of whether the Government's use of certain evidence supplied by a secret informer operated to invalidate the convictions. *Hoffa v. United States*, 385 U.S. 293 (1966).

It appears from the *Hoffa* opinion in the Sixth Circuit that some of the United States Courts of Appeal are split between the orthodox rule and the variation of that rule which is followed in Louisiana, with the Ninth and Second Circuits following the orthodox rule, see *Carbo v. United States, United States v. Dennis*, supra, and the Sixth Circuit following the procedure which is used in Louisiana.

*Jackson v. Denno*, 378 U.S. 368 (1964), in which this Court held that the trial judge in a criminal trial must make a clear-cut determination of the voluntariness of a confession and cannot leave this determination to the jury, is clearly distinguishable from a case such as the instant one involving conspiracy.

Initially it should be noted that Professor Edmund

H. Morgan, who suggested in his article *Functions of Judge and Jury*, 43 Harv.L.Rev. 165, 167-169 (1929), that the issue of the voluntariness of a confession should be determined by the judge and not the jury, and who was cited as authority in this Court's opinion in *Jackson v. Denno*, (see n. 15 at 378 U.S. 389), approves of the decision of the preliminary fact by the jury *when, as in cases involving conspiracy, the preliminary fact coincides with an ultimate fact for the jury*. See Morgan, op. cit. supra, 177-183.

Second, the question of the voluntariness of a confession has a "true independent identity", whereas the preliminary question of fact in coincidence cases such as one involving conspiracy has "no true independent identity", to quote from Maguire and Epstein, *Preliminary Questions of Fact*, 40 Harv.L.Rev. 392, 418 (1926). Thus the issue of the voluntariness of a confession lends itself very readily to a clear-cut preliminary decision by the judge, whereas the existence or not of a conspiracy among joint defendants is a question which is inseparable from the issue of the guilt or innocence of the accused—that is, the question of admissibility "merges imperceptibly into the weight of the evidence, if admitted." *DiCarlo v. United States*, 6 F.2d 364, 367. As Wigmore says, ". . . so far as the admissibility in law depends on some *incidental* question of fact—. . . the use of threats to obtain a confession . . . and the like—this also is for the judge to determine, before he admits the evidence to the jury." 9 Evidence 501 (3 ed. 1940).[10] (Italics ours)

[10]The same reasoning applies to the determination of

Third, as this Court said in *Jackson v. Denno*, an accused is deprived of due process of law if his conviction is founded upon an involuntary confession, without regard for the truth or falsity of the confession. 378 U.S. at 376. Thus the issue for decision by the judge in determining the admissibility of a confession is one of *competency* and not one of *relevancy*, and the learned treatises which deal with the question posed here appear to be agreed that when the competency of A depends upon the existence of B, the existence of B should always be for the judge, whereas when the relevancy of A depends upon the existence of B, the existence of B should normally be for the jury. See Morgan, *Functions of Judge and Jury*, 43 Harv.L.Rev. 165, 167-169 (1929); Barnhart, *Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1, 17-20 (1947). The rationale underlying this distinction is that a jury is likely to disregard an exclusionary rule, as this Court noted in *Jackson v. Denno*, at 378 U.S. 388. However, "when the conditioning fact determines merely the relevancy of the offered fact there is no need for any special safeguarding procedure, for relevancy is a mere matter of probative pertinence which the jury understands and is willing to observe." McCormick, Evidence 125 (1954).

Fourth, the question of whether a confession was voluntarily made, or whether evidence was constitu-

---

whether evidence was constitutionally obtained under the Fourth Amendment. See, in this connection, *Steele v. United States*, 267 U.S. 505, 511 (1925).

tionally seized, are matters which have absolutely nothing to do with the commission of the crime itself, but concern themselves, rather, with the problem of whether the evidence on which the prosecution relies was constitutionally obtained. Thus, when a trial judge passes on the voluntariness of a confession or decides a motion to suppress he is not usurping the role of the jury because he is not passing on the ultimate issue of guilt or innocence, but is only determining what evidence the prosecution can use in trying to prove guilt. However, when the question of admissibility is indistinguishable from the issue of guilt or innocence, as in the case at bar, the best way to handle the problem appears to be as it is done in the Louisiana courts, with the trial judge making a preliminary, but tentative, finding of fact, leaving it to the jury to pass on the question again while reaching their verdict on the merits.

In their brief filed in this Court petitioners have not argued the conspiracy issue, being of the opinion that it is lacking in "national interest". Brief, p. 25. However, in their Petition for Certiorari they claim that the conspiracy portion of the trial judge's charge prejudiced them because, among other things, it was combined with the "system and intent" rule of evidence "whereby other offenses, not charged at all, are brought before the jury." Petition, p. 21.

This Court's attention is directed to the fact that the "other acts" which the prosecution brought before the jury at the trial of this case in order to show system and intent under La.R.S. 15:445-446 was the May

28 sale of marijuana and heroin to Agent Hebert. This sale occurred only one week after the date of the sale herein charged and was intimately connected to the crime herein charged, having the same locus and cast of characters. In fact, the May 21 and May 28 narcotic sales were part of one continuing transaction at Skinner's Motor Mart, covering a period of a few weeks and involving the three accused herein and the two undercover agents of the Louisiana Police who were working on the case, Ben Fullington and Russell Hebert. In the view of the State of Louisiana, evidence of the May 28 sale of marijuana and heroin would have been admissible as part of the res gestae at the trial of the instant case, as well as to show system and intent.

The State of Louisiana is of the respectful view that the trial judge's charge to the jury covering the law of conspiracy was correct and that it in no way prejudiced the accused herein.

## CONCLUSION

No error having occurred during the trial of this case in the Louisiana courts, the State of Louisiana respectfully asks that this Honorable Court recall the Writ of Certiorari which was issued herein as improvidently granted and affirm the judgment of the Louisiana Supreme Court.

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.

JIM GARRISON,
District Attorney for the Parish of Orleans.

LOUISE KORNS,
Assistant District Attorney for the Parish of Orleans.

## CERTIFICATE

I, Jim Garrison, a member of the Bar of the Supreme Court of the United States, certify that a copy of this Brief has been sent to:

G. W. Gill, Sr., Esq.
George M. Leppert, Esq.
1707 Pere Marquette Bldg.
New Orleans, La.—70112

Attorneys for William Skinner
and August R. Gueldner

Robert S. Link, Sr., Esq.
National Bank of Commerce Bldg.
New Orleans, Louisiana—70112

Attorney for
Alton J. Charbonnet

New Orleans, Louisiana, this ____ day of August, 1968.

_____

JIM GARRISON

LIBRARY
PREME COURT, U. S.

JAN 23 1969

JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

---

## No. 44

---

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,

Petitioners.

*versus*

STATE OF LOUISIANA,

Respondent.

---

On Writ of Certiorari to the SUPREME COURT OF LOUISIANA to review "State of Louisiana vs. William Skinner, et al", No. 48,445 of the Docket of That Court.

---

## *SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS*

---

G. WRAY GILL, SR.
GEO. M. LEPPERT
1707 Pere Marquette Bldg.
New Orleans, La.
ROBERT S. LINK, JR.
Nat'l Bank of Commerce Bldg.
*Attorneys for Petitioners*

Franklin Printing Company, Inc. • 209 Magazine St. • New Orleans • 522-9654

## INDEX


| | Page |
|---|---|
| Past Record Irrelevant | 1 |
| Additional Record References | 3 |
| Nature of Pre-Trial Motions | 3 |
| The Preliminary Hearing Has Double Purpose | 4 |
| No Waiver | 5 |
| Failure To Call Important Witness | 7 |
| Certificate of Service | 10 |

In THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

---

**No. 44**

---

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,

Petitioners.

*versus*

STATE OF LOUISIANA,

Respondent.

---

On Writ of Certiorari to the SUPREME COURT OF LOUISIANA to review "State of Louisiana vs. William Skinner, et al", No. 48,445 of the Docket of That Court.

---

## *SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS*

---

### *PAST RECORD OF CHARBONNET IRRELEVANT HERE*

After argument herein the State of Louisiana submitted to the Clerk of this Court a letter in which was enclosed a document which was not contained in the record of this case below but which showed numerous prior convictions of petitioner Charbonnet. Request was made by the State of Louisiana that said document be presented to the Court and the purported reason for said oblique offer of the out-of-the record document was that it would tend to answer a question propounded by a member of the Court as to how

it came about that Charbonnet received so long a sentence for a marihuana violation, i.e. fifty years. The fact is, of course, that this query had been fully answered during oral argument when counsel for the State properly answered that under the Louisiana Habitual Offender Law, R.S. 15: 529.1, such sentence was justified. This fact was obviously conceded by petitioners in view of their complete silence as to the technical propriety of the term of fifty years, and their failure to question this lengthy term, either in brief or oral argument. Nor do we now challenge the technical propriety of such a lengthy term, provided of course the conviction here is valid. But, inasmuch as our able distaff opponent has come into Court belatedly waving a document which is heralded as showing NINE PREVIOUS CONVICTIONS it seems necessary that this "last word" offered by the State should be qualified by at least this much rejoinder: **None of the previous convictions were in any way involved with narcotics.** An examination of the document offered, which is, in fact a copy of an information which was the basis of sentencing Charbonnet in a separate case, No. 194-010 of the District Court, shows that all of the convictions of Charbonnet were for such crimes as theft, receiving stolen property and cognate offenses and that none appear to have involved narcotics in any way.

Logically, of course, it would make no difference to the validity of these proceedings what the previous convictions involved narcotics or an aggravated assault upon the Shah of Iran. But the rather transparent attempt here to inject the prejudicial image of Charbonnet as being a one man narcotic epidemic by saying simply that he had nine prior convictions is highly misleading.

The main thrust of the argument here as to Charbonnet, of course, is that he was deprived of due process by

failure to even notify him of the trial of several motions directly affecting his case, as developed in detail in our original brief.

## *PERTINENT RECORD REFERENCES*

In oral argument certain questions were asked of counsel for petitioners and we now submit record references to bolster our oral answers thereto and to supplement portions of our original brief in which record references are lacking:

### 1.

### *THE NATURE OF THE PRE-TRIAL MOTIONS AS AFFECTING CHARBONNET*

As we urged in our original brief, the pre-trial motions at which Charbonnet was neither present, represented or even notified, involved issues directly affecting him and vital to his case. These motions involved the taking of extensive testimony on two separate sessions, Oct. 8, 1965 (which appears first in record, Vol. 1, page 42 et seq) and Sept. 23, 1965 (which appears later, Vol. 1, page 73 et seq.)

The broad scope and effect of these hearings is clearly indicated by the following passage during the hearing of Sept. 23, 1965, the first hearing, wherein the following appears at Vol. 1, page 90:

"BY MR. SCIACCIA:

Your Honor, may I object at this juncture and say to the Court that as I understand it the matter before the Court is a motion to suppress the evidence.

BY THE COURT: We have two or three matters we are taking this testimony on. It is a Motion to Suppress and

Dismiss, A Motion to Quash and a Special Plea of Entrapment. I am trying to cut the trial as much as I can to let the testimony pertaining to the three issues. **Of course, if th testimony would pertain to any of the other propositions such as the Motion for Preliminary Examination and the Bill of Particulars * * * I was just trying to take the testimony of this gentleman and let it apply to as many of the pleadings as it applies to"** etc. (Emphasis added)

Again, at the second hearing of pre-trial motions held on Oct. 8, 1965, it was stipulated between the State and the defendants Skinner and Gueldner that, **on the hearing for preliminary examination the previous testimony of the undercover agent, Hebert, taken in connection with a motion to suppress, would be admitted in evidence.** (Vol. 1, R. 42)

In other words, as noted by the Court in the earlier quotation, what this procedure amounted to was that all of the evidence taken at either hearing would be admitted in evidence insofar as applicable to all pending motions.

## *PRELIMINARY HEARING HAS DOUBLE PURPOSE IN LOUISIANA*

In Louisiana criminal procedure preliminary hearings are controlled by Articles 291 through 298 of the Code of Criminal Procedure. Article 295 of said Code provides, inter alia:

"The transcript of the testimony of any other witness who testified at the preliminary examination is admissable for any purpose **in any subsequent proceeding in the case,** on behalf of either party, if the court finds that the witness is dead, too ill to testify, absent from the state, or cannot be found" etc. (Emphasis added)

From the foregoing it is clear that, in addition to resolving the question of whether or not an accused should be held over for trial, a preliminary hearing may well serve as a means of gathering vital evidenec which in fact is later used at trial. Thus, by failing to notify Charbonnet of the various hearings on motions, and by failing to require his presence and representation at same, the Trial Court gave its blessing to a weird procedure whereby evidence usable later against Charbonnet might be gathered while he languished in jail and took no part in proceedings vitally affecting him. It is no answer to say that, in fact, none of the extensive testimony taken at the various pretrial evidence was offered, as such, at the actual trial. The point is that it was taken at a preliminary hearing, that it could have been used and that this sort of proceeding was something which obviously required that he be present and represented. Aside from the general rule throughout the country quoted at page 15 of our originla brief (from 14 Am.Jur.Sec.189, page 898) the established Louisiana rule, quoted at page 14 of our original brief, demanded that Charbonnet be present and represented at these vital hearings. As stated in a leading Louisiana case (State v. Pope, 39 So.2d 719, 214 La. 1026) The accused:

"* * * must be personally present at every important stage of the trial from the moment of the arraignment to his sentence, otherwise a verdict against him will be set aside."

## *NO WAIVER HERE*

It has been urged that even if Charbonnet should have been present and represented at the pre-trial motions, when he finally obtained counsel who became active on his part and obtained a copy of the previous pre-trial proceedings, failure to demand similar hearings on behalf of Charbonnet

amounted to a waiver of whatever prejudice which had resulted.

The first answer to this is that, under Article 292 of the Louisiana Code of Criminal procedure after an indictment is found or an information is filed, the granting of a preliminary hearing is purely discretionery. This article provides:

"Before the finding of an indictment or the filing of an information the court, on request of the state or of the defendant, SHALL immediately order a preliminary examination in felony cases.

After the finding of an indictment or the filing of an information an order for a preliminary examination MAY be granted by the court at any time either on its own motion or on request of the state or of the defendant." (Emphasis added)

Therefore, since the granting of a preliminary hearing was discretionery even as to the hearings actually held (which all took place after the information was filed) it is highly unlikely the trial judge would have exercised his discretion a second time in favor of another preliminary hearing. As noted in our original brief on page 9, the Court had taken the position that Charbonnet did not have to be present or represented at hearing of the preliminary motions **because he had not filed them.** (Vol. 1, R.80) Thus, after these lengthy hearings had been held and after new counsel for Charbonnet had obtained a copy of these proceedings, it seems quite obvious that the trial judge would not have exercised his discretion in favor of a preliminary examination a second time and rehash the same matter virtually on the eve of the trial.

As noted in our oral argument, one reason why counsel for Charbonnet did not demand another preliminary hearing was that the copy of the proceedings which he had been furnished showed a serious error in the identity of the agent who allegedly purchased the marijuana. But over and above that strategic reason for not demanding a preliminary hearing or trial of other motions, the simple fact is that, if the proceeding at trial of these motions was deemed to be of the sort at which due process demanded that Charbonnet be present and represented, his constitutional rights could only be waived by him personally and knowingly and certainly could not be waived by any finely spun theory of implied waiver by non-action of counsel.

## *EXHAUSTED COUNSEL FAILED TO CALL IMPORTANT WITNESS*

In our original brief we failed to give record reference as to the fact that Mr. Gill, ill and exhausted after an all night session, overlooked calling an important witness, a Mr. Keenan. Mr. Keenan testified (in Vol. 2, R.348) that he was a witness who could have testified that the 1960 Lincoln automobile in which the marijuana was found on the Skinner car lot, did not belong to Skinner.

During oral argument the question was asked as to whether or not this testimony would have been relevant. Clearly, we submit, it was relevant because the factual issues were hotly contested, even as to the basic facts related by the agents and even as to whether or not they were present at the time they claimed to have been. Vol. 3, R. 425). The weight of such evidence, of course, is debatable, but the real point here is that counsel for defendants would have leaped at this error by the State in suggesting that the contraband was found in Skinner's car when said

car actually belonged to someone else. That he failed to use this evidence, with a witness ready at hand, could only have been due to the fact that he was exhausted, as his doctor testified he must have been, and overlooked it.

Further evidence that Mr. Gill was exhausted, both physically and mentally, is shown by the fact that during final argument to the jury he was wandering in irrelevant remarks. He began to make a statement to the jury, in the form of personal testimony, which were objected to by the State and the objection was sustained. (Vol. 2, R. 247.)

The Supreme Court of Louisiana, in its majority opinion misses the point in declaring: (Appendix, page 45)

"We conclude that no matter what his physical feelings were, such feelings, as well as his physical condition, had no effect on Mr. Gill's intellectual ability **between 12:25 a.m. and 2:45 a.m., March 22, 1966.**" (Emphasis added)

Of course the condition of Mr. Gill between the early morning hours noted by the Court was not the most important period at all. The most important period was that from 9:30 a.m. till the end of the trial when, after an all night session, and precious little rest, counsel was forced to proceed with argument. It was at this period that his most grievous errors were committe, i.e. failure to put on the witness Keenan and his weak and wandering argument. But the Court says nothing of this crucial period, and concludes, from most superficial evidence that simply because "he reserved bills of exception and engaged in colloquy with the Court," he was "astute and vigorous." In the face of the uncontradicted medical testimony that a man in his condition would be reduced to zero efficiency after twelve hours, it is difficult to understand this con-

clusion. As noted by his doctor in extensive testimony, Mr. Gill was eventually hospitalized for a substantial period, largely as a result of this gruelling session.

Finally, it should be noted that the long hours, wholly uncalled for, not only exhausted counsel and caused at least two jurors to fall asleep, but the judge himself was not at his shining best. He became confused and gave a full blown charge of conspiracy (where none was charged in the information) and this error formed the sole basis of the reversal in the original opinion. In addition, his weariness doubtless led to the error noted (but not presented here) wherein he got hold of the wrong and of the best evidence rule. (Bill of Exceptions 24, R.231)

As to the condition of the jury after the all night session there can be little doubt that at least two of them went to sleep and all of them were more or less comatose.

For all of the above reasons we submit that this was a travesty of a trial and the judgment below should be reversed.

Respectfully submitted,

G. WRAY GILL, SR.
GEO. M. LEPPERT
1707 Pere Marquette Bldg.
New Orleans, La.
ROBERT S. LINK, JR.
Nat'l Bank of Commerce Bldg.
*Attorneys for Petitioners*

## CERTIFICATE OF SERVICE

I, Geo. M. Leppert, of counsel for petitioners and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing supplemental brief has been served upon the District Attorney for the Parish of Orleans, State of Louisiana and the Attorney General of Louisiana, by mailing same, postage prepaid, to their respective offices on the——day of Jan. 1969.

Geo. M. Leppert

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

---

## No. 44

---

WILLIAM SKINNER, AUGUST R. GUELDNER AND ALTON J. CHARBONNET,

Petitioners,

*versus*

STATE OF LOUISIANA,

Respondent.

---

*On Writ of Certiorari to the Supreme Court of Louisiana to Review "STATE OF LOUISIANA VS. WILLIAM SKINNER ET AL," No. 48,445 of the Docket of said Court.*

---

## *PETITION FOR REHEARING ON DENIAL OF CERTIORARI.*

---

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners, William Skinner, August R. Gueldner and Alton J. Charbonnet, pray that this Court grant a rehearing of its order of January 27, 1969, wherein, by a vote of six to 3, this Court recalled the writ of certiorari as having been improvidently issued.

## *REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT*

In applying for a rehearing of the denial of certiorari here, petitioners find no problem in presenting new matter, not previously urged. The three points urged in our original application were merely errors which counsel arbitrarily selected with a view to presenting points deemed to be of greater national interest. As we will show, however, this Alice-in Wonderland travesty of a trial overflowed abundantly with procedural error. The errors we now discuss clearly amounted to denial of due process of law under the Federal Constitution and the results permitted here by the District Judge and sanctioned by the State Supreme Court bear little resemblance to due process as conceived elsewhere in the Union. Unless Louisiana is to be deemed a never-never land, entitled to pursue its own, home-made concept of due process and permitted to stand apart from the other States "grand, gloomy and peculiar", a rehearing should be granted.

For more than three years petitioners have remained in prison while this case worked its way to the summary docket of this Honorable Court. Under the stringent provisions of Lousiana law as to denial of bail after conviction, they have served these three years in prison without even the assurance that they will, be given credit for time served, quo ad their penitentiary sentences of 10, 16 and fifty years. Rather than submit to the injustice of this mock trial petitioners have elected to pursue to the bitter end the numerous errors committed below in the hope that somehow, somewhere, the full spotlight of judicial inquiry will be focused upon the dark corners of this shoddy imitation of a trial. Petitioners are well aware that the chances of obtaining a rehearing from denial of certiorari are, percentage wise, about on a par with completing a ninety nine

yard pass in the last thirty seconds of a football game. But such things have happened and, with a vote of six to three as it now stands, it may well be that two more inquiring minds upon this august bench will be prompted to take one more look at what has been allowed to pass for due process in Louisiana. Such a look will reveal that all the masking in Louisiana is not done on Mardi Gras and that the Louisiana brand of due process, in the respects indicated below, is shockingly different than that recognized throughout the rest of these still more or less United States:

### *THE COVER-UP OF A VICIOUS ENTRAPMENT*

As noted in our original and supplemental briefs, the State undercover agents here, Fullington and Hebert, were originally trying to make a marijuana case against one of the employees of Skinner, petitioner herein. Skinner was a reputable dealer in second hand automobiles, operating two rather sizeable establishments. He had no previous history of any connection with narcotics, either as a user or pusher. Being unable to make a case against Skinner's employee, the agents set out to create a case against him. They had developed an elaborate "front" or "cover" for this investigation and it may well be that they were desirous of making some sort of case to justify the time and expense involved in setting up the trap for the employee. This "front" or "cover" consisted in having agent Fullington set up as an executive officer in a finance company which handled loans on automobiles. It was a company with which Skinner financed cars sold through his two places of business.

As a part of the defense of entrapment, the defense sought to show:

(a) That when the case against the employee of

Skinner fell through the State undercover officers sought to make a case against Skinner himself; and

(b) That the agent Fullington, as a step in this entrapment of Skinner, proceeded to "feel out" his influence with the latter by getting Skinner to lend him money for bets at the racetrack and get him dates with women.

The quid pro quo for such goodies, of course, was the approval by Fullington, on behalf of the finance company, of certain dubious loans which Skinner needed in his automobile business. Thus, the key issue in the defense of entrapment was whether or not agent Fullington was in fact approving bad loans as a device of ingratiating himself with Skinner. Yet the trial Judge abruptly shut off all inquiry as to this most important issue in the following manner: In Bill of Exceptions No. 8, Vol. 1, R. 160, the trial Judge made it impossible to show the manner in which agent Fullington entrapped Skinner by restricting the cross-examination of Agent Fullington. As will appear by the Bill reserved here, and the excerpts of testimony attached, a Mr. Keenan was the finance company boss of agent Fullington. Fullington was asked: (Vol. 1, R. 160)

BY MR. GILL:

Q. Did you at or about that time, while you were there and Mr. Keenan was there, have a discussion about the loans you were making?

A. I don't quite understand the question.

Q. Didn't you tell Mr. Keenan when he asked you about some of the loans you were approving—

BY MR. DOLAN:

I object.

BY THE COURT:

Sustained. ITS IRRELEVANT AND IMMATERIAL.

BY MR. GILL:

Didn't you tell Mr. Keenan that you had your reasons:

*BY MR. DOLAN:*

I object.

BY THE COURT:

I ruled on that. He cannot answer the question. I have ruled it is immaterial.

Thereupon the defense reserved a bill, urging specifically that the question was proper, both to attack the credibility of Fullington and to show the improper means whereby the entrapment was committed. (Vol. 1, R. 160, 161)

In his Per Curiam the trial Judge seeks to justify his action as follows: (Vol. 1, R. 162)

> "The defendants were on trial for selling and possessing narcotics and what loans of money the witness was making was certainly irrelevant and immaterial to the issues being tried."

The above, of course, wholly ignores the fact that this defense of entrapment had been urged even before trial, that extensive evidence had been taken in connection with a Special Plea of Entrapment, previously discussed in connection with the pre-trial hearings and that said defense was being repeatedly presented throughout the trial proper.

For example, in a separate bill of exception, immediately following, Bill No. 9, Vol. 1, R. 163, further inquiry was made of this same witness, Fullington, as to the manner in which he was misusing his finance company connec-

tion to entrap Skinner, and the modus operandi was described by the defense as follows: (Vol. 1, R. 163:)

> "Benjamin Fullington was practically donating the Finance Company's interest to Mr. Skinner for the purpose of ingratiating himself with him, * * * ".

Again, in Bill No. 10 (Vol. 1, R. 167, 169), the Court likewise unduly restricted cross examination of agent Fullington as to how he was approving bad loans through the finance company in order to entrap Skinner. In this last instance the Court, in his Per Curiam, came up with a new basis for his action. To the objection by the State that the question about the loan device was immaterial, the Court declared: (Vol. 1, R. 169)

> "I don't know whether it's irrelevant. I'll rule it's **repetitious.**"

The question was repetitious only in the sense that three times the defense had sought to show the entrapment device (*supra*) and the first two attempts had been repulsed on the grounds of irrelevancy. Thus, the answer sought had not been permitted at all. But, on the third go round the trial Judge finds the same attempt **repetitious.** The attempt, of course was repetitious, but the answer would not have been repetitious because the answer had never been permitted. This was weird.

The State Supreme Court, in its opinion on rehearing (at page 35, Appendix attached to petition for certiorari) merely compounds the mystery as to irrelevancy by simply concluding, without analysis:

> "We find that the evidence sought to be elicited was neither relevant nor material. We affirm the trial judge's per curiam to this bill."

There follows simply a direct quotation of the entire

Per Curiam of the trial Judge, which, as we have noted, simply concludes that the line of questioning was irrelevant and material without in any way disposing of the entrapment issue, with which the issue of using financial pressure via approval of Skinner's auto loans was directly connected.

By this ruling of the trial Court, (approved of by the enigmatic ruling of the State Supreme Court), the jury was thus denied the right to know how and why the undercover agents were able to persuade a reputable business man like Skinner to "set up" a contact for the agents to secure marijuana. Skinner had nothing in his past to connect him with marijuana, either as a user or a vendor. But, by dangling before his eyes the prospective approval of more bad or borderline automobile loans, which he needed, Fullington was able to trap him into setting up a meeting with a marijuana source.

This financial pressure was a vicious device aimed at creating a classic case of entrapment, i.e. causing a man to commit a crime who had no idea in the world of either using or selling marijuana. The jury was entitled to know this essential background fact as part of the picture of entrapment. But the ruling by the trial judge that it was "irrelevant", without explanation or discussion, was grossly prejudicial. Unless this grievous error is corrected, therefore, petitioners will go to the penitentiary for terms of 10, 16 and 50 years, respectively.

### *A BUTCHERING OF THE "BEST EVIDENCE" RULE*

The grossly prejudicial procedure we complain of here was preserved below by Bill of Exceptions No. 24 (Vol. 1, R. 231) and relates to the exclusion of a bill of sale of an automobile on the date of the alleged offense. A

defense witness, Mrs. Virgil Niette, testified that she had been transacting some business at the Skinner automobile lot during the entire morning of May 21, 1965, during the very hours in which the State undercover agent was supposed to have been there and persuaded Skinner to set up a meeting later on that date whereby the agent could procure some marijuana. (Vol. III, R. 636 et sequo). She had testified that she had bought a second hand car some days before at the Skinner lot and there had been a delay as to delivery. On the 21 of May, at nine a.m., she indignantly "camped" on the doorstep of the Skinner auto lot, demanding delivery of the car she had purchased. Skinner was not there and she dogged the footsteps of defendant Gueldner all morning, demanding her car. SHE TESTIFIED THAT SKINNER DID NOT ARRIVE UNTIL ABOUT 1 P.M. AND THAT AGENT FULLINGTON, WHO WAS POINTED OUT TO HER IN THE COURTROOM, WAS NOT PRESENT AT ALL, ANYWHERE ON THE LOT, AND THAT SHE WAS THERE UNTIL ABOUT 2:30 p.m. (Vol. III, R. 628, 629). This contention, of course, struck at the vitals of the State theory, namely that Fullington had met with Skinner at the lot that morning and set up the meeting for the delivery of marijuana from Charbonnet later that evening. For, if Fullington was not even present at all, then the alleged meeting between him and Skinner or Gueldner was a lie, or at least another gross factual error.

Fullington had testified that he had gone to the lot at about 11 a.m. that morning, May 21, met Skinner and arranged with Skinner for the later contact with Charbonnet. (Vol. 3, R. 425)

Thus, if Mrs. Niette was to be believed, Fullington was dead wrong on two main points: (a) He was not present at the lot at any hour even close to 11 a.m. (because Mrs.

Niette was there continuously from 9 till 2:30) and (b) Skinner, with whom he was supposed to have set up the Charbonnet meeting, was not there at all.

Mrs. Niette had testified that she had been to the Skinner lot on three successive days, ending on May 21, 1965, the date of the alleged offense. To bolster her personal recollection of the crucial date, May 21, she relied in part upon the bill of sale for the automobile, which bill of sale she finally got on the crucial date, May 21, the time she was there all morning and failed to see either Skinner or Fullington there. When counsel for the defense showed her this document, the bill of sale dated May 21, and began to question her about the date, May 21, and the name of the party who signed it, THE COURT ON HIS OWN MOTION AND WITHOUT ANY OBJECTION BY THE STATE, STOPPED THIS LINE OF QUESTIONING AS FOLLOWS: (Vol. III, R. 630)

> BY THE COURT:
>
> This lady's testimony is the best evidence. Don't go to secondary evidence to confirm . . . its not permissible in law. YOU CAN'T ASK ABOUT IT AT ALL.
>
> BY MR. GILL:
>
> Your Honor says I can't introduce anything that pertains to this?
>
> BY THE COURT:
>
> That's the law.

Thereafter, a second attempt was made to have Mrs. Niette identify the address on the bill of sale, and this line of questioning was stopped by the Court as follows: (Vol. III, R. 632)

> BY THE COURT:
>
> I have told you this lady's testimony is the best evidence. It's the primary evidence. THIS IS

SECONDARY EVIDENCE AND CAN ONLY CORROBORATE HER TESTIMONY WHICH IS NOT PERMITTED UNDER THE LAW."

After this ruling, which denied the right to question the recipient of the bill of sale about its contents, counsel for defendants then offered the bill of sale itself in evidence, which offer was denied and a bill reserved. (Vol. III, R. 633).

In his Per Curiam the trial Judge reverses his field mysteriously and justifies the exclusion of the bill of sale, not on the grounds that it violated the best evidence rule (as he had indicated at trial) but simply on the grounds that it was "irrelevant and immaterial to the issues of the case being tried." (Vol. II, R. 233)

But, we respectfully submit, neither grounds justified the ruling of the Court. Certainly, the bill of sale, bearing the same date as the alleged offense, was a crucial piece of evidence and if it served to corroborate the witness as to the correct date, she could certainly testify that she received it on the date at issue, and the bill of sale itself was clearly admissible in order to corroborate her. In such a situation the best evidence rule had no more application than the Geneva Convention or The Rule in Shelley's Case. Where a party is testifying about events with which he is directly connected the documents themselves have been held admissible in many Federal cases. SEE: ALL NATIONS TRADING CO. INC. V. UNITED STATES, Fifth Cir. 1964, 338 F. 2d 501; RELEFORD VS. UNITED STATES, Ninth Cir. 1962, 309 F. 2d 706; CARROL V. UNITED STATES, Ninth Cir., 1964, 326 F. 2d 72. Moreover, the leading Louisiana case on the subject, STATE V. KELLY, 112 So. 2d 674 (1959) establishes a similar rule.

By this ruling, therefore, the trial Court, with his home-made version of the best evidence rule, excluded vital evidence which would have corroborated Mrs. Niette as to the correct date and have struck a mortal blow at the State's case. The Court, after having had an opportunity to explore the law which he had so confidently misconstrued at trial, abandoned his "best evidence" theory when it came time to write his Per Curiam. He then simply said it was all "irrelevant and immaterial". It would be difficult to conceive of a fact which would have been more relevant or more material than the question of whether or not agent Fullington was even present at the auto lot when he allegedly persuaded Skinner to set up the contact with Charbonnet.

## *"SYSTEM OR INTENT" RULE CARRIED TO RIDICULOUS EXTREME*

We deal here with a series of four bills covering the same issue. i.e. the undue stretching of the rule as to "system or intent" whereby evidence of other offenses is admissible. (See Bills No. 6 (Vol. I, R. 149), No. 18 (Vol. I, R. 199), No. 19 (Vol. I, R. 206), and No. 21 (Vol. I, R. 214).)

By way of introduction, it should be observed that, when it comes to stretching the rule pertaining to evidence of other offenses for the purpose of showing system or intent, Louisiana appears to hold the world's record. The most glaring misapplication of this rule is to be found in the 1963 Louisiana Supreme Court decision of *STATE V. MORRIS*, 157 So. 2d 728, 245, La. 475. There a man was being tried for murder of a woman in a barroom. Applying the Louisiana version of the "system or intent" evidence rule, the State was permitted to show that the accused, SOME SEVEN YEARS PREVIOUSLY, had violently killed another person in a barroom. Just how a

barroom killing seven years previously could throw any light as to intent in the case being tried, was never explained. The Louisiana Court merely stated the rule and left it hanging in the air. (See opinion, last paragraph of page 729, 157 So. 2d through first column, page 730)

In the instant case the Louisiana version of the system or intent evidence rule came into play as follows:

The information charged the offense of sale and possession of marijuana on a single date, May 21, 1965. Under the guise of showing system or intent the State was permitted, over objection, to show another sale of marijuana at a **later** date, May 28, 1965. Then, although not a word had been said about anything but marijuana, after the agent **was alone with Charbonnet on this second alleged sale he prevailed upon him to procure some heroin.** Over a continuing objection, the agent, Hebert, was permitted to testify that Charbonnet then told him **that he could get some heroin at another address** but that he would not do so in the presence of the other agent, Fullington; that he would have to drop off Fullington and he, Charbonnet would then get the heroin elsewhere and deliver it elsewhere. (Vol. III, R. 578 through 580)

Thus, the evidence as to heroin transaction should not have been admitted under even the most liberal application of the system or intent evidence rule, because:

(a) There was not a scintilla of evidence that either Skinner or Gueldner had any thing to do with any heroin transaction or that they even knew of any such possibility;

(b) The supposed transaction was consummated at a completely different place; and,

(c) It is inconceivable that this heroin transaction could have thrown any light whatever upon the "intent"

of either Skinner or Gueldner (as to the marijuana offense a week earlier).

The prejudicial effect of this purported system or intent evidence, particularly the admission of the heroin transaction, was aggravated by the fact that the Court gave a conspiracy charge, although no conspiracy was charged in the information at all. This error as to the giving of the full blown conspiracy charge **was the original basis of reversal in the State Supreme Court.** The giving of this charge itself is not now urged as a basis of applying for this rehearing, because it was included in the three points on which certiorari was sought in this Court. But certainly this conspiracy charge can now be considered in the light of its effect upon the minds of a jury confronted with the ridiculously extended Louisiana version of system or intent evidence. This full blown conspiracy charge informed the jury that conspiracy was a sort of partnership in crime and that, during the life of the conspiracy, the acts of one conspirator were chargeable against the other. (Vol. II, R. 358) Thus, with this instruction before it and the three separate contraband transactions before it, the jury would have been hard put indeed to tell which transaction proved what in regard to the other. Was the May 28 heroin transaction (with which Skinner and Gueldner had no connection at all) supposed to relate back in some mysterious manner so as to show a guilty intent on their part as of the earlier date, May 21, the only date on which they were supposed to have committed a crime? Or was the May 28 marijuana transaction supposed to be considered retroactively so as to show guilty intent on May 21? Or was the heroin transaction chargeable against Skinner and Gueldner on the conspiracy theory of partnership in crime given by the trial Judge? In this context, we submit, much more than the intelligence of 12 jurors was required. This

situation called for the wisdom of the Twelve Apostles, briefed by the Holy Ghost.

In conclusion, we submit that this error alone would justify a rehearing herein from the standpoint of national interest. For, if a conspiracy charge can be applied to and joined with an application of a liberal system and intent rule, we need no longer pay lip service to the theory that a man must defend only against the specific offense charged.

For the foregoing reasons we respectfully submit that a rehearing should be granted, that the writ should be granted and that the judgment below should be reversed.

Respectfully submitted,

G. WRAY GILL, SR.
GEO. M. LEPPERT
1707 Pere Marquette Bldg.

ROBERT S. LINK, JR.
Nat'l Bank of Commerce Bldg.
All of New Orleans, La.
*Attorneys for Petitioners*

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

---

*Of Counsel for Petitioners*

## CERTIFICATE OF SERVICE

I, Geo. M. Leppert, a member of the Bar of this Court in good standing and of counsel for petitioners in the above application for rehearing, do hereby certify that a copy of the foregoing petition for rehearing has been served upon the District Attorney for the Parish of Orleans, State of Louisiana and the Attorney General of Louisiana by posting same, postage prepaid, addressed to their respective offices on the_____day of Feb., 1969.

---

Geo. M. Leppert

# SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1968.

William Skinner et al., Petitioners, v. State of Louisiana. } On Writ of Certiorari to the Supreme Court of Louisiana.

[January 27, 1969.]

Per Curiam.

The writ of certiorari is dismissed as improvidently granted.

Mr. Justice Marshall, with whom Mr. Chief Justice Warren and Mr. Justice Douglas join, dissenting.

Petitioners were convicted of the possession and sale of marijuana and given lengthy prison terms. The Louisiana Supreme Court affirmed. *State* v. *Skinner*, 251 La. 300, 204 S. 2d 370 (1967). We granted certiorari to consider several alleged errors occurring during the course of the state court proceedings. *Skinner* v. *Louisiana*, 391 U. S. 963 (1968).

Petitioners argued before this Court that they were denied due process of law because the trial court refused to declare a recess, but instead allowed the trial to continue until nearly 3 a. m.[1] The principal basis for this claim is that Mr. Gill, counsel for Skinner and Gueldner, had become ineffective due to illness. I believe that the failure of the court to recess the trial when requested to do so by Gill effectively deprived petitioners Skinner and Gueldner of right to the assistance of counsel guar-

[1] The other alleged errors were the absence of one petitioner at hearings on certain pre-trial motions, the arraignment of one petitioner without counsel, and the giving of a conspiracy charge when no conspiracy was charged in the information.

anteed by the Sixth and Fourteenth Amendments to the Constitution.

The facts are relatively simple. After several continuances, some granted because of Gill's illness, trial of the case commenced on the morning of March 21, 1966. The morning was consumed by selection of the jury and the trial proper did not commence until 2:45 p. m. The court recessed from 6:15 to 8 p. m. for dinner and at 11:40 p. m., the State rested. At that time, the following colloquy took place between court and counsel:

> "By MR. GILL. Before asking for a recess, I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.
>
> "By THE COURT. You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight. Go to work and see if we can't finish the case tonight.
>
> "By MR. GILL. I'll do what Your Honor says.
>
> "By THE COURT. I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much. . . .
>
> "By MR. GILL. I want to say one more thing, Your Honor. I have a severe case of diabetes.
>
> "By THE COURT. I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.

"By MR. GILL. May I further say this. I tested myself for sugar. . . .

"By THE COURT. We will take a recess for three minutes.

"By MR. GILL. If Your Honor please, I respectfully request Your Honor declare a mistrial."

Thereafter, the court recessed for 35 minutes and reconvened at 12:25 a. m. The defense then presented its case. At 3 a. m., the court declared a recess until 9:30 the next morning. When the court reconvened, both parties presented their arguments to the jury.

In their motion for a new trial, petitioners alleged that the court erred in not declaring a recess after the State had rested. The trial court held a hearing on this issue, including the question of whether any of the jurors had been asleep during the trial.[2] Gill and his physician testified at that hearing. Gill testified that by the time the State had concluded its case he was "just about dead on my feet" and that he did not, either that evening or the next morning, present the type of defense to which petitioners were entitled. He failed to ask for a mistrial after he had noticed a juror sleeping and had not called two possible witnesses. He had been in the hospital the week before and had just finished trying a case shortly before the present one began. During that earlier trial, he had found it necessary to go to bed by 7 p. m. His physical condition continued to deteriorate and he entered the hospital for two weeks shortly after the trial.

---

[2] All three petitioners allege that at least two jurors were observed to have been sleeping during the trial and assign this allegation as further support for the argument that the length of the trial session deprived them of due process. The trial court, after a hearing on the motion for a new trial, found that none of the jurors had been asleep.

Gill's doctor then testified as to his condition three days after the trial and to his probable condition on the day of the trial. He testified that Gill was suffering from an acidotic condition due to diabetes and from nervous exhaustion. The doctor testified that Gill's efficiency at the trial would have been about two-thirds of normal and, after midnight, he "would be practically ineffective."

The court sympathized with Gill but pointed out that the docket had to be cleared up and that the only way to do that is to "force lawyers to try cases." The motion for a new trial was denied.

The Louisiana Supreme Court held that the record indicated that Gill had conducted a vigorous defense, reserving bills of exception and engaging in colloquy with the court. The testimony of the doctor was discounted because it was not supported by the record and because the doctor was not in court at the time of the trial. Accordingly, the court found no prejudice.

The State argues that granting of recesses is in the discretion of the trial court and that no abuse of that discretion has been demonstrated here. This Court has frequently indicated that the granting of continuances and recesses is within the discretion of the trial court. See, *e. g.*, *Ungar* v. *Sarafite*, 376 U. S. 575, 589 (1964). Neverthless, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ibid.* It is clear to me that in the present case, the trial judge's concern with the state of his docket has resulted in depriving petitioners of their right to effective assistance of counsel.

Gill made it clear to the court that he was suffering from diabetes and that the length of the day's trial and the lateness of the hour had exhausted him. And the court was familiar with the history of Gill's health prob-

lems. Yet, before Gill could even tell the court the level of his blood sugar, the court denied his request for a recess. I think it clear that the record establishes that Gill was seriously ill, to the knowledge of the court. I think it irrelevant that he was able to continue and present a credible defense; we should not be required to speculate when counsel is performing up to his capacity. Nor do I think it relevant that Gill did not take more affirmative action to establish the state of his health or to secure a recess or a continuance the next morning. As Gill himself testified, and his doctor confirmed, his efficiency at the time was practically nil. I find it hard to believe that court calendars are so congested that diabetic counsel must be forced to work until the early morning hours to clear them up. Accordingly, I would reverse the convictions of petitioners Skinner and Gueldner.